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CASES REPORTED IN VOLUME I

PAGE
Abbott, Feebery *v.* [K.B.D.] .. 512
Adams *v.* Adams [C.A.] .. 334
Amalgamated Denaby Collieries, Ltd., Rossington Main Colliery Co., Ltd., and, Dalton Main Collieries, Ltd. *v.* [C.A.] .. 544
Andre & Cie. S.A. (Lausanne), de Ridder (Luis), Ltd. *v.* [K.B.D.] .. 380
Ashbridge and Martin, Murfin *v.* [C.A.] .. 231
Barclays Bank, Ltd. *v.* Pratt, *Re* Twiss [Ch.D.] 93
Barclays Bank, Ltd. *v.* Webb, *Re* Webb [Ch.D.] 321
Batting *v.* London Passenger Transport Board [C.A.] .. 228
Bell *v.* Walker [C.A.] .. 307
Benedek, Manley Estates, Ltd. *v.* [C.A.] 248
Benham *v.* Gambling [H.L.] .. 7
Birch, Pease & Partners, Ltd. *v.* [C.A.] .. 343
Birkenhead Corporation, De Luxe Car Services and, Browne *v.* [C.A.] .. 383
Black Sea and Baltic General Insurance Co., Ltd., Renton (G.H.) & Co., Ltd. *v.* [K.B.D.] 149
Bodega, Ltd., Slaters and, Freehold and Leasehold Investment Co., Ltd. *v.* [C.A.] .. 310
Bodega, Ltd., Slaters and, Metropolitan Real and General Property Trust, Ltd. *v.* [C.A.] 310
Bodega, Ltd., Slaters and, Regal Property Trust, Ltd. *v.* [C.A.] .. 310
Bolton Corporation, *Ex parte*, R. *v.* National Arbitration Tribunal [K.B.D. Divl. Ct.] .. 413
Bond (Stella), Ltd., Turner *v.* [C.A.] .. 449
Boudou *v.* Thornton-Smith [C.A.] .. 454
Bristol Tramways and Carriage Co., Ltd., Franklin *v.* [C.A.] .. 188
Browne *v.* De Luxe Car Services and Birkenhead Corporation [C.A.] .. 383
Brueton *v.* Woodward [K.B.D.] .. 470
Buckland (Victor), Ltd., Drury *v.* [C.A.] .. 269
Burnley Recorder, R. v. *Ex parte* New Empire (Burnley), Ltd. (No. 2) [C.A.] .. 549
Bushell, Frampton and, Frampton *v.* [Div.] .. 305
Cambrian Wagon Works, Ltd., Davis *v.* [C.A.] 460
Cammell Laird & Co., Ltd., Duncan *v.* [C.A.] 437
Campbell *v.* Campbell and Lewis [C.A.] .. 274
Chadburn *v.* Chadburn [Div.] .. 407
Chadwick *v.* Pioneer Private Telephone Co., Ltd. [K.B.D., Manchester Winter Assizes] .. 522
Clancy, Sothern-Smith *v.* [C.A.] .. 111
Clavering *v.* Conduit Mead Co. [Ch.D.] .. 30
Conduit Mead Co., Clavering *v.* [Ch.D.] .. 30
Cooper *v.* Jax Stores, Ltd., [C.A.] .. 502
Cooper, Luxor (Eastbourne), Ltd. (in liquidation) *v.* [H.L.] .. 33
Corbett *v.* Duff [K.B.D.] .. 512
Dale *v.* Duff [K.B.D.] .. 512
Dalton Main Collieries, Ltd. *v.* Rossington Main Colliery Co., Ltd., and Amalgamated Denaby Collieries, Ltd. [C.A.] .. 544
Dan & Stone, Ltd. *v.* Lennard [C.A.] .. 101
Davis *v.* Cambrian Wagon Works, Ltd. [C.A.] 460
Daw (C. A.) & Son, Ltd., Haseldine *v.* [K.B.D.] 525
De Luxe Car Services and Birkenhead Corporation, Browne *v.* [C.A.] .. 383
de Ridder (Luis), Ltd. *v.* Andre & Cie. S.A. (Lausanne), [K.B.D.] .. 380
Destone Fabrics, Ltd., *Re* [Ch.D.] .. 545
Diamond *v.* Minter [K.B.D.] .. 390
PAGE
Diplock, *Re*, Wintle *v.* Diplock [C.A.] .. 193
Dollman *v.* Hillman (A. & S.), Ltd. [C.A.] .. 355
Donington Finance Co., Ltd., Fishmongers' Company *v.* [C.A.] .. 137
Dow, Potter *v.*, *Re* Mylne [Ch.D.] .. 405
Drury *v.* Buckland (Victor), Ltd. [C.A.] .. 269
Duff, Corbett *v.* [K.B.D.] .. 512
Duff, Dale *v.* [K.B.D.] .. 512
Duncan *v.* Cammell Laird & Co., Ltd. [C.A.] 437
Embassy Cinema (Tottenham Court Road), Ltd., Smallman *v.* [C.A.] .. 241
Ever Ready Co. (Great Britain), Ltd., London Armoury Co., Ltd. *v.* [K.B.D.] .. 364
Fairbairn Lawson Combe Barbour, Ltd., Fibrosa Societe Anonyme *v.* [K.B.D.] .. 464
Fairrie, Rook *v.* [C.A.] .. 297
Feebery *v.* Abbott [K.B.D.] .. 512
Fibrosa Societe Anonyme *v.* Fairbairn Lawson Combe Barbour, Ltd. [K.B.D.] .. 464
Fishmongers' Company *v.* Donington Finance Co., Ltd. [C.A.] .. 137
Forster *v.* Llanelly Steel Co. (1907), Ltd. [H.L.] .. 1
Frampton *v.* Frampton and Bushell [Div.] 305
Franklin *v.* Bristol Tramways and Carriage Co., Ltd. [C.A.] .. 188
Fredensen *v.* Rothschild [Ch.D.] .. 430
Freehold and Leasehold Investment Co., Ltd. *v.* Slaters and Bodega, Ltd. [C.A.] .. 310
Gale, *Re*, Gale *v.* Gale [Ch.D.] .. 329
Gambling, Benham *v.* [H.L.] .. 7
Gibson *v.* Norfolk County Council [K.B.D. Divl. Ct.] .. 252
Gillingham Corporation, Newell *v.* [K.B.D.] .. 552
Glenearn, The [Prize] .. 371
Gordon, Read *v.* [C.A.] .. 222
Gould *v.* McAuliffe [K.B.D.] .. 515
Great Eastern Electric Co., Ltd., *Re* [Ch.D] 409
Griffiths *v.* Smith [H.L.] .. 66
Harris *v.* Poland [K.B.D.] .. 204
Haseldine *v.* Daw (C. A.) & Son, Ltd. [K.B.D.] 525
Herrmann, Metropolitan Leather Co., Ltd. *v.* [Ch.D.] .. 29
Hichens Harrison Woolsten & Co. *v.* Jackson & Sons [K.B.D.] .. 562
Higgs *v.* Higgs [Div. Divl. Ct.] .. 214
Hillman (A. & S.), Ltd., Dollman *v.* [C.A.] .. 355
Horn *v.* Sunderland Corporation [K.B.D.] 166
Horn *v.* Sunderland Corporation [C.A.] .. 480
Hunt, Merchants' and Manufacturers' Insurance Co., Ltd. *v.* [C.A.] .. 123
Hurd, *Re*, Stott *v.* Stott [Ch.D.] .. 238
Jackson & Sons, Hichens Harrison woolsten & Co. *v.* [K.B.D.] .. 562
Jacobs *v.* Ramsden, *Re* Samuel [Ch.D.] .. 539
Jax Stores, Ltd., Cooper *v.* [C.A.] .. 502
Joslin, *Re*, Joslin *v.* Murch [Ch.D.] .. 302
Lauderdale, Midland Bank Executor and Trustee Co., Ltd., and, Mastaka *v.*, *Re* White [Ch.D.] .. 236
Lennard, Dan & Stone, Ltd. *v.* [C.A.] .. 101
Lewis, Campbell and, Campbell *v.* [C.A.] .. 274
Lindsay's Settlement (No. 1), *Re* [Ch.D.] .. 104
Lindsay's Settlement (No. 2), *Re* [Ch.D.] .. 148

PAGE
Liverpool Co-operative Society, Ltd., Miller *v.* [C.A.] 379
Llanelly Steel Co. (1907), Ltd., Forster *v.* [H.L] 1
London Armoury Co., Ltd. *v.* Ever Ready Co. (Great Britain), Ltd. [K.B.D.] 364
London County Council, Weston *v.* [K.B.D.] 555
London, Midland & Scottish Ry. Co., Sugar *v.* [K.B.D.] 172
London Passenger Transport Board, Batting *v.* [C.A.] 228
Luxor (Eastbourne), Ltd. (in liquidation) *v.* Cooper [H.L.] 33
Major, Mouser *v.* [C.A.] 180
Manley Estates, Ltd. *v.* Benedek [C.A.] 248
Martin, Ashbridge and, Murfin *v.* [C.A.] 231
Mason *v.* Warlow [C.A.] 475
Mastaka *v.* Midland Bank Executor and Trustee Co., Ltd., and Lauderdale, *Re* White [Ch.D.] 236
McAuliffe, Gould *v.* [K.B.D.] 515
Merchants' and Manufacturers' Insurance Co., Ltd. *v.* Hunt [C.A.] 123
Metropolitan Leather Co., Ltd. *v.* Herrmann [Ch.D.] 29
Metropolitan Real and General Property Trust, Ltd. *v.* Slaters and Bodega, Ltd. [C.A.] 310
Michel Habib Raji Ayoub *v.* Sheikh Suleiman el Taji el Farouqi [P.C.] 507
Midland Bank Executor and Trustee Co., Ltd., and Lauderdale, Mastaka *v.*, *Re* White [Ch.D.] 236
Miller *v.* Liverpool Co-operative Society, Ltd. [C.A.] 379
Minter, Diamond *v.* [K.B.D.] 390
Mortleman, Wharton (J.) (Shipping), Ltd. *v.* [K.B.D.] 175
Mouser *v.* Major [C.A.] 180
Murch, Joslin *v.*, *Re* Joslin [Ch.D.] 302
Murfin *v.* Ashbridge and Martin [C.A.] 231
Mylne, *Re*, Potter *v.* Dow [Ch.D.] 405
National Arbitration Tribunal, R. *v.*, *Ex parte* Bolton Corporation [K.B.D. Divl. Ct.] 413
National Marketing Co., Plomien Fuel Economiser Co., Ltd. *v.* [Ch.D.] 311
National Provincial Bank, Ltd., *Re* [Ch.D.] 97
New Empire Burnley, Ltd., *Ex parte*, R. *v.* Burnley Recorder (No. 2) [C.A.] 549
Newell *v.* Gillingham Corporation [K.B.D.] 552
Norfolk County Council, Gibson *v.* [K.B.D. Divl. Ct.] 252
Ocean Steamship Co., Ltd. *v.* Queensland State Wheat Board [C.A.] 158
Ouston (H. C. & J. G.), Scammell (G.) & Nephew, Ltd. *v.* [H.L.] 14
Pease & Partners, Ltd. *v.* Birch [C.A.] 343
Pioneer Private Telephone Co., Ltd., Chadwick *v.* [K.B.D., Manchester Winter Assizes] 522
Plomien Fuel Economiser Co., Ltd. *v.* National Marketing Co. [Ch.D.] 311
Poland, Harris *v.* [K.B.D.] 204
Pollock, *Re*, Pollock *v.* Pollock [Ch.D.] 360
Portman *v.* Roskill & Sons [Ch.D.] 226
Potter *v.* Dow, *Re* Mylne [Ch.D.] 405
Powell Duffryn Associated Collieries, Ltd., Yelland *v.* [C.A.] 278
Pratt, Barclays Bank, Ltd. *v.*, *Re* Twiss [Ch.D.] 93
Prins Knud, The [Prize] 443

PAGE
Public Trustee *v.* Ward, *Re* Ward [Ch.D.] 315
Queensland State Wheat Board, Ocean Steamship Co., Ltd. *v.* [C.A.] 158
R. *v.* Burnley Recorder, *Ex parte* New Empire (Burnley), Ltd. (No. 2) [C.A.] 549
R. *v.* National Arbitration Tribunal, *Ex parte* Bolton Corporation [K.B.D. Divl. Ct.] 413
Ramsden, Jacobs *v.*, *Re* Samuel [Ch.D.] 539
Read *v.* Gordon [C.A.] 222
Regal Property Trust, Ltd. *v.* Slaters and Bodega, Ltd. [C.A.] 310
Renton (G. H.) & Co., Ltd. *v.* Black Sea and Baltic General Insurance Co., Ltd. [K.B.D.] 149
Rook *v.* Fairrie [C.A.] 297
Roskill & Sons, Portman *v.* [Ch.D.] 226
Rossington Main Colliery Co., Ltd., and Amalgamated Denaby Collieries Ltd., Dalton Main Collieries, Ltd. *v.* [C.A.] 544
Rothschild, Fredensen *v.* [Ch.D.] 430
Salford Corporation, Summers *v.* [K.B.D. Manchester Autumn Assizes] 153
Samuel, *Re*, Jacobs *v.* Ramsden [Ch.D.] 539
Scammell (G.) & Nephew, Ltd. *v.* Ouston (H. C. & J. G.) [H.L.] 14
Schering, Ltd., Stockholms Enskilda Bank Aktiebolag *v.* [C.A.] 257
Sheikh Suleiman el Taji el Farouqi, Michel Habib Rabib Haji Ayoub *v.* [P.C.] 507
Slater *v.* Worthington's Cash Stores (1930), Ltd. [K.B.D. Leicester Autumn Assizes] 245
Slaters and Bodega, Ltd., Freehold and Leasehold Investment Co., Ltd. *v.* [C.A.] 310
Slaters and Bodega, Ltd., Metropolitan Real and General Property Trust, Ltd. *v.* [C.A.] 310
Slaters and Bodega, Ltd., Regal Property Trust, Ltd. *v.* [C.A.] 310
Smallman *v.* Embassy Cinema (Tottenham Court Road), Ltd. [C.A.] 241
Smith, Griffiths *v.* [H.L.] 66
Sothern-Smith *v.* Clancy [C.A.] 111
Stockholms Enskilda Bank Aktiebolag *v.* Schering, Ltd. [C.A.] 257
Stott *v.* Stott, *Re* Hurd [Ch.D.] 238
Sugar *v.* London, Midland & Scottish Ry. Co. [K.B.D.] 172
Summers *v.* Salford Corporation [K.B.D. Manchester Autumn Assizes] 153
Sunderland Corporation, Horn *v.* [K.B.D.] 166
Sunderland Corporation, Horn *v.* [C.A.] 480
Thornton-Smith, Boudou *v.* [C.A.] 454
Turner *v.* Bond (Stella), Ltd. [C.A.] 449
Twiss, *Re*, Barclays Bank, Ltd. *v.* Pratt [Ch.D.] 93
Walker, Bell *v.* [C.A.] 307
Ward, *Re*, Public Trustee *v.* Ward [Ch.D.] 315
Warlow, Mason *v.* [C.A.] 475
Webb, *Re*, Barclays Bank, Ltd. *v.* Webb [Ch.D] 321
Weston *v.* London County Council [K.B.D.] 555
Wharton (J.) (Shipping), Ltd. *v.* Mortleman [K.B.D.] 175
White, *Re*, Mastaka *v.* Midland Bank Executor and Trustee Co., Ltd., and Lauderdale [Ch.D.] 236
Wintle *v.* Diplock, *Re* Diplock [C.A.] 193
Woodward, Brueton *v.* [K.B.D.] 470
Worthington's Cash Stores (1930), Ltd., Slater *v.* [K.B.D. Leicester Autumn Assizes] 245
Yelland *v.* Powell Duffryn Associated Collieries, Ltd. [C.A.] 278

CASES REFERRED TO

PAGES

Addie (R.) & Sons (Collieries) *v.* Dumbreck, [1929] A.C. 358 ; Digest Supp. ; 98 L.J.P.C. 119 ; 140 L.T. 650 .. .. 515, 518, 526, 531
Admiralty Lords Comrs. *v.* Aberdeen Steam Trawling & Fishing Co., Ltd., [1909] S.C. 335 ; 22 Digest 94, case *637ii* 437, 441
Ambler (Jeremiah) & Sons, Ltd. *v.* Bradford Corpn., [1902] 2 Ch. 585 ; 38 Digest 102, *736* ; 71 L.J.Ch. 744 ; 87 L.T. 217 .. .. 67, 90
Ankin *v.* London & North Eastern Ry. Co. [1930] 1 K.B. 527 ; Digest Supp. ; 99 L.J.K.B 293 ; 142 L.T. 368 .. .. 437, 438, 439, 440
Asiatic Petroleum Co., Ltd. *v.* Anglo Persian Oil Co., Ltd., [1916] 1 K.B. 822 ; 18 Digest 166, *1202 ;* 85 L.J.K.B. 1075 ; 114 L.T. 645 .. .. 437, 438
A.-G. *v.* Ard Coasters, Ltd., Liverpool & London War Risks Insurance Assocn., Ltd. *v.* S.S. Richard De Larrinaga Marine Underwriters, [1921] 2 A.C. 141 ; 29 Digest 228, *1851 ;* 91 L.J.K.B. 31 ; 125 L.T. 548 ; *affg.* S.C. *sub nom.* Richard De Larrinaga (Owners) *v.* Admiralty Comrs., [1920] 3 K.B. 65 ; *affg.* S.C. *sub nom.* Ard Coasters, Ltd. *v.* R. (1919), 35 T.L.R. 604 ; (1920), 36 T.L.R. 555 .. .. 176, 177, 178, 180
A.-G. *v.* Margate Pier and Harbour Co. of Proprietors, [1900] 1 Ch. 749 ; 38 Digest 102, *734* ; 69 L.J.Ch. 331 ; 82 L.T. 448 .. .. 66, 72, 89
A.-G. *v.* Premier Line, Ltd., [1932] 1 Ch. 303 ; Digest Supp. ; 101 L.J.Ch. 132 ; 146 L.T. 297 .. .. 365, 370
A.-G. for New Zealand *v.* Brown, [1917] A.C. 393 ; 8 Digest 298, *748 ;* 86 L.J.P.C. 132 ; 116 L.T. 624 .. .. 193, 195, 196, 198, 201, 202
Austin *v.* Drewe (1816), 4 Camp. 360 ; 29 Digest 316, *2608* 205, 209, 211, 212, 213
Austin *v.* Great Western Ry. Co. (1867), L.R. 2 Q.B.442 ; 8 Digest 95, *638 ;* 36 L.J.Q.B. 201 ; 16 L.T. 320 .. .. 526, 533
Ayr *v.* St. Andrews Ambulance Assocn., [1918] S.C. 158 ; 38 Digest 125, case *P.* 66, 72, 81

Bailey *v.* Howard, [1939] 1 K.B. 453 ; [1938] 4 All E.R. 827 ; Digest Supp. ; 108 L.J.K.B. 182 ; 160 L.T. 87 .. .. 8, 11
Ball, *Re*, Lucas *v.* Ball, [1940] 4 All E.R. 245 ; Digest Supp. 93, 95
Banks *v.* Hollingsworth, [1893] 1 Q.B. 442 ; 16 Digest 405, *2509 ;* 62 L.J.Q.B. 239 ; 68 L.T. 477 ; *affg.* S.C. *sub nom.* Banks *v.* Barclay (1892) 67 L.T. 861 .. 31, 32
Banks *v.* Ripley, [1940] Ch. 719 ; [1940] 3 All E.R. 49 ; Digest Supp. 430, 433
Barker *v.* Herbert, [1911] 2 K.B. 633 ; 36 Digest 197, *374 ;* 80 L.J.K.B. 1329 ; 105 L.T. 349 .. .. 245, 247
Bawean, The, [1918] P. 58 ; 37 Digest 582, *170 ;* 87 L.J.P. 100 ; 118 L.T. 319 .. .. 371, 379
Beadling *v.* Goll (1922), 39 T.L.R. 128 ; 25 Digest 419, *227* 470, 471
Beatson *v.* Skene (1860), 5 H. & N. 838 ; 22 Digest 392, *4013 ;* 29 L.J.Ex. 430 ; 2 L.T. 378 .. .. 437, 438, 439
Beckwith *v.* Philby (1827), 6 B. & C. 635 ; 14 Digest 177, *1544 ;* 5 L.J.O.S.M.C. 132 .. 391, 398
Benham *v.* Gambling, [1941] 1 All E.R. 7 ; Digest Supp. 280, 289
Bentall, Horsley & Baldry *v.* Vicary, [1931] 1 K.B. 253 ; Digest Supp. ; 100 L.J.K.B. 201 ; 144 L.T. 365 .. .. 34, 38, 57
Bird *v.* Keep, [1918] 2 K.B. 692 ; 13 Digest 260, *408 ;* 87 L.J.K.B. 1199 ; 118 L.T. 633 ; 11 B.W.C.C. 133 .. .. 361, 362
Blaiberg, *Re*, Blaiberg *v.* De Andia Yrarrzaval (Marquise), [1940] Ch. 385 ; [1940] 1 All E.R. 632 ; Digest Supp. 405, 406, 539, 543, 544
Blakiston *v.* Cooper, [1909] A.C. 104 ; 28 Digest 86, *495* ; 78 L.J.K.B. 135 ; 100 L.T. 51 ; 5 Tax Cas. 347 .. .. 512, 513, 514
Blencowe *v.* Northamptonshire County Council, [1907] 1 Ch. 504 ; 19 Digest 560, *35 ;* 76 L.J.Ch. 276 ; 96 L.T. 385 .. .. 67, 88
Boddington, *Re*, Boddington *v.* Clariat (1883), 22 Ch.D. 597 ; 44 Digest 874, *7308 ;* 52 L.J.Ch. 239 ; 48 L.T. 110 ; *on appeal* (1884), 25 Ch.D. 685 .. 329, 331, 333
Bond v. Pettle (1921), *The Times*, Jan. 15 .. .. 223, 225
Bowling *v.* Camp (1922), 128 L.T. 342 ; 25 Digest 419, *226* 470, 471
Bowman *v.* Secular Society, Ltd., [1917] A.C. 406 ; 8 Digest 265, *270 ;* 86 L.J.Ch. 568 ; 117 L.T. 161 .. .. 193, 195, 197, 198, 201
Bradford Corpn. *v.* Myers, [1916] 1 A.C. 242 ; 38 Digest 110, *784 ;* 85 L.J.K.B. 146 ; 114 L.T. 83 ; *affg.*, [1915] 1 K.B. 417 66, 70, 71, 72, 74, 75, 76, 77, 78, 82, 89, 90, 91, 92
Bray *v.* Ford, [1896] A.C. 44 ; 32 Digest 164, *1988 ;* 65 L.J.Q.B. 213 ; 73 L.T. 609 ; *revsg.* (1894), 11 T.L.R. 32 .. .. 297, 300
Britain S.S. Co. *v.* R., Green *v.* British India Steam Navigation Co., British India Steam Navigation Co. *v.* Liverpool & London War Risks Insurance Assocn., [1921] 1 A.C. 99 ; 29 Digest 230, *1860* ; 89 L.J.K.B. 881 ; 123 L.T. 721 ; *affg.*, [1919] 2 K.B. 670 175, 177, 178, 179
British & Benningtons *v.* North Western Cachar Tea Co., etc., [1923] A.C. 48 ; 12 Digest 355, *2958 ;* 92 L.J.K.B. 62 ; 128 L.T. 422 .. .. 15, 25
British & Foreign S.S. Co. *v.* R., [1918] 2 K.B. 879 ; 29 Digest 228, *1849 ;* 87 L.J.K.B. 910 ; 118 L.T. 640 .. .. 175, 177, 178
British Columbia Electric Ry. Co., Ltd. *v.* Gentile, [1914] A.C. 1034 ; 36 Digest 131, case *l.* 279, 296
Brookes *v.* Brown (1922), 39 T.L.R. 3 ; 25 Digest 419, *225* 470, 471
Brown *v.* Carstairs (1811), 3 Camp. 161 ; 29 Digest 132, *849* 149, 152
Brown *v.* Lizars, [1905] 2 C.L.R. 837 ; 14 Digest 178, case *1562i* 391, 400
Bryant, *Ex p.* (1815), 1 Madd. 49 ; 42 Digest 276, *3097* 275, 276
Buccleuch (Duke) *v.* Metropolitan Board of Works (1872), L.R. 5 H.L. 418 ; 11 Digest 134, *215 ;* 41 L.J.Ex. 137 ; 27 L.T.1. ; *on appeal from* L.R. 5 Exch. 221 .. 481, 493
Buckner *v.* Ashby & Horner, Ltd. (1940), 57 T.L.R. 238 ; Digest Supp. 526, 538
Burgess's Policy, *Re* (1915), 85 L.J.Ch. 273 ; 27 Digest 151, *1220 ; sub nom. Re* Burgess's Policy, Lee *v.* Scottish Union National Insurance Co., 113 L.T. 443 .. .. 321, 323
Burroughes *v.* Abbott, [1922] 1 Ch. 86 ; 35 Digest 92, *17* ; 91 L.J.Ch. 157 ; 126 L.T. 354 430, 435, 436
Butler (or Black) *v.* Fife Coal Co., Ltd., [1912] A.C. 149 ; 34 Digest 218, *1809 ;* 81 L.J.P.C. 97 ; 106 L.T. 161 ; 5 B.W.C.C. 217 .. .. 279, 287
Byrne *v* Boadle (1863), 2 H. & C. 722 ; 36 Digest 51, *315* ; 33 L.J.Ex. 13 ; 9 L.T. 450 .. 355, 357

Calico Printers' Assocn., Ltd. *v.* Higham, [1912] 1 K.B. 93; 34 Digest 462, *3781;* 81 L.J.K.B. 232; 105 L.T. 734; 5 B.W.C.C. 97 .. 461, 462, 463

Card *v.* Case (1848), 5 C.B. 622; 2 Digest 242, *267;* 17 L.J.C.P. 124; 10 L.T.O.S. 416 .. 515, 519

Carter *v.* Stubbs (1880), 6 Q.B.D. 116; Digest, Practice, 705, *2999;* 50 L.J.Q.B. 161; 43 L.T. 746 .. 249, 250

Castle *v.* St. Augustine's Links, Ltd. (1922), 38 T.L.R. 615; 36 Digest 186, *300* .. 355, 357

Chamberlain *v.* West End of London and Crystal Palace Ry. Co. (1863), 2 B. & S. 617; 11 Digest 140, *263;* 32 L.J.Q.B. 173; 8 L.T. 149; *on appeal from* (1862), 31 L.J.Q.B. 201 .. 481, 494

Chandler *v.* Webster, [1904] 1 K.B. 493; 12 Digest 407, *3282;* 73 L.J.K.B. 401; 90 L.T. 217 .. 464, 469

Charlesworth *v.* Holt (1873), L.R. 9 Exch. 38; 27 Digest 232, *2039;* 43 L.J.Ex. 25; 29 L.T. 647 .. 335, 337, 339, 341, 342

Chile, The, [1914] P. 212; 37 Digest 643, *956;* 84 L.J.P. 1; 112 L.T. 248 .. 443

Christie *v.* Griggs (1809), 2 Camp. 79; 8 Digest 75, *515* .. 526, 533

Clarke *v.* Bethnal Green Borough Council, [1939] 2 All E.R. 54; Digest Supp.; 160 L.T. 292 .. 67, 77, 91

Clarke *v.* St. Helens Borough Council (1915), 85 L.J.K.B. 17; 38 Digest 111, *794;* 113 L.T. 681 .. 67, 91, 92

Clarke's Settlement, *Re,* [1902] 2 Ch. 327; 30 Digest 286, *128;* 71 L.J.Ch. 593; 86 L.T. 653 .. 144, 148

Clavering *v.* Conduit Mead Co., [1941] 1 All E.R. 30; Digest Supp. .. 29, 30

Clavering *v.* Ellison (1859), 7 H.L.Cas. 707; 44 Digest 440, *2667;* 29 L.J.Ch. 761; *affg.* (1857), 8 De G.M. & G. 662; *affg.* (1856), 3 Drew. 451 .. 539, 542

Clawley *v.* Carlton Main Colliery Co., [1918] A.C. 744; 34 Digest 461, *3775;* 87 L.J.K.B. 920; 119 L.T. 715; 11 B.W.C.C. 440; *revsg.,* [1917] 2 K.B. 691 .. 461, 463

Cleaver *v.* Mutual Reserve Fund Life Assocn., [1892] 1 Q.B. 147; 29 Digest 369, *2969;* 61 L.J.Q.B. 128; 66 L.T. 220 .. 321, 322, 323, 324

Coggs *v.* Bernard (1703), 2 Ld. Raym. 909; 8 Digest 18, *85* .. 526, 533

Cohen *v.* Gold, [1927] 1 K.B. 865; Digest Supp.; 96 L.J.K.B. 419; 136 L.T. 723 .. 181, 187

Coltness Iron Co. *v.* Black (1881), 6 App. Cas. 316; 28 Digest 6, *13;* 51 L.J.Q.B. 626; 45 L.T. 145; 1 Tax Cas. 287 .. 112, 113, 114, 116

Commonweath *v.* Deacon, 10 Sergeant and Rawle (Pennsylvania) 125 .. 391, 402

Commonwealth Shipping Representative *v.* Peninsular & Oriental Branch Service, [1923] A.C. 191; 29 Digest 226, *1838;* 92 L.J.K.B. 142; *affg.* S.C. *sub nom. Re* Peninsular & Oriental Branch Service *v.* Commonwealth Shipping Representative, [1922] 1 K.B. 706 .. 176, 178

Cottrell, *Re,* Buckland *v.* Bedingfield, [1910] 1 Ch. 402; 23 Digest 421, *4924;* 79 L.J.Ch. 189; 102 L.T. 157 .. 93, 94, 95

Cox, *Re,* Public Trustee *v.* Eve, [1938] Ch. 556; [1938] 1 All E.R. 661; Digest Supp.; 159 L.T. 13 .. 93, 94

Curran (Edward) & Co. *v.* Kays, [1928] 2 K.B. 469; Digest Supp.; 97 L.J.K.B. 806; 139 L.T. 294; 21 B.W.C.C. 203 .. 461, 463

Cutter *v.* Powell (1795), 6 Term Rep. 320; 34 Digest 88, *649* .. 34, 55

Daimler Co., Ltd. *v.* Continental Tyre & Rubber Co. (Gt. Britain), Ltd., [1916] 2 A.C. 307; 2 Digest 145, *195;* 85 L.J.K.B. 1333; 114 L.T. 1049 .. 259

Daksa, The, [1917] A.C. 386; 37 Digest 585, *207;* 86 L.J.P.C. 130; 116 L.T. 364 .. 371, 378

Dallow *v.* Garrold, *Ex p.* Adams (1884), 14 Q.B.D. 543; 42 Digest 302, *3366;* 54 L.J.Q.B. 76; 52 L.T. 240 .. 275, 277

Darracq Motor Engineering Co., Ltd. *v.* Seaward (1935) 28 B.W.C.C. 64; Digest Supp. .. 101, 102, 103

David *v.* Britannic Merthyr Coal Co., [1909] 2 K.B. 146; 34 Digest 219, *1816;* 78 L.J.K.B. 659; 100 L.T. 678; *on appeal,* [1910] A.C. 74 .. 279, 282, 287, 365, 366, 369

Davies *v.* Bristow, Penrhos College *v.* Butler, [1920] 3 K.B. 428; 31 Digest 575, *7231;* 90 L.J.K.B. 164; 123 L.T. 655 .. 223

Davis *v.* Harrison (1927), 96 L.J.K.B. 848; Digest Supp. 137 L.T. 324; 11 Tax Cas. 707 .. 512, 514

Davis *v.* Russell (1829), 5 Bing. 354; 14 Digest 179, *1570;* 7 L.J.O.S.M.C. 52 .. 391 398

Dempster, *Re,* Borthwick *v.* Lovell, [1915] 1 Ch. 795; 23 Digest 420, *4918;* 84 L.J.Ch. 597; 112 L.T. 1124 .. 93, 94

Diplock, *Re,* Wintle *v.* Diplock, [1941] 1 All E.R. 193; Digest Supp.; *revsg.,* [1940] 3 All E.R. 538 .. 315, 317

Dobell & Co. *v.* Rossmore S.S. Co., [1895] 2 Q.B. 408; 41 Digest 429, *2697;* 64 L.J.Q.B. 777; 73 L.T. 74 .. 159, 160, 164

Dodworth *v.* Dale, [1936] 2 K.B. 503; [1936] 2 All E.R. 440; Digest Supp.; 105 L.J.K.B. 586; 155 L.T. 290; 20 Tax Cas. 285 .. 335, 336

Doe d. Davy *v.* Oxenham (1840), 7 M. & W. 131; 32 Digest 447, *1157;* 10 L.J.Ex. 6 .. 476

Dormer (otherwise Ward) *v.* Ward, [1901] P. 20; 27 Digest 521, *5629;* 69 L.J.P. 144; 83 L.T. 556 .. 335, 336

Dott *v.* Brown, [1936] 1 All E.R. 543; Digest Supp.; 154 L.T. 484 .. 112, 113, 114

Douglas, *Re,* Obert *v.* Barrow (1887), 35 Ch.D. 472; 8 Digest 298, *754;* 56 L.J.Ch. 913; 56 L.T. 786 .. 194, 196

Dublin United Tramways Co. *v.* Fitzgerald, [1903] A.C. 99; 43 Digest 344, *37;* 72 L.J.P.C. 52; 87 L.T. 532 .. 383, 386, 387

Duckworth *v.* Johnson (1859), 4 H. & N. 653; 36 Digest 132, *873;* 29 L.J.Ex. 25; 33 L.T.O.S. 274 .. 279, 295

Dunbar (otherwise White) *v.* Dunbar, [1909] P. 90; 27 Digest 501, *5365;* 78 L.J.P. 35; 100 L.T. 380 .. 335, 336

Dutton *v.* Sneyd Bycars Co., Ltd., [1920] 1 K.B. 414; 34 Digest 387, *3140;* 89 L.J.K.B. 85; 122 L.T. 333; 12 B.W.C.C. 345 .. 343, 345, 348

Dyer *v.* Dyer (1788), 2 Cox, Eq. Cas. 92; 25 Digest 511, *78* .. 321, 324

Earl *v.* Lubbock, [1905] 1 K.B. 253; 36 Digest 63, *408;* 74 L.J.K.B. 121; 91 L.T. 830 .. 526, 537, 538

Eaves *v.* Eaves, [1939] P. 361; [1939] 2 All E.R. 789; Digest Supp.; 161 L.T. 119 .. 335

Edwards *v.* Metropolitan Water Board, [1922] 1 K.B. 291; 38 Digest 111, *795;* 91 L.J.K.B. 210; 126 L.T. 300 .. 67, 77, 78, 90, 91, 92

Edwards *v.* St. Mary, Islington, Vestry (1889), 22 Q.B.D. 338; 38 Digest 107, *765;* 58 L.J.Q.B. 165; 60 L.T. 725 .. 67, 90

Ellis *v.* Fulham Borough Council, [1938] 1 K.B. 212; [1937] 3 All E.R. 454; Digest Supp.; 107 L.J.K.B. 84; 157 L.T. 380 .. 526, 531

Ellis (Matthew), Ltd., *Re,* [1933] Ch. 458; Digest Supp.; 102 L.J.Ch. 65; 148 L.T. 434 .. 545, 548

Ellis, *Re,* Nettleton *v.* Crimmins, [1935] Ch. 193; Digest Supp.; 104 L.J.Ch. 53; 152 L.T. 370 .. 93, 94

Ellis *v.* Selby (1836), 1 My. & Cr. 286; 8 Digest 295, *726;* 5 L.J.Ch. 214 194, 196
Engelbach's Estate, *Re*, Tibbetts *v.* Engelbach, [1924] 2 Ch. 348; 29 Digest 422, *3283;* 93 L.J.Ch. 616; 130 L.T. 401 321, 323, 324, 325, 327, 328
Ertel Bieber & Co. *v.* Rio Tinto Co., Dynamit Act. *v.* Rio Tinto Co., Vereinigte Koenigs & Laurahuette Act. *v.* Rio Tinto Co., [1918] A.C. 260; 12 Digest 395, *3211;* 87 L.J.K.B. 531; 118 L.T. 181 464, 467
Ettenfield *v.* Ettenfield, [1939] P. 377; [1939] 2 All E.R. 743; Digest Supp.; 161 L.T. 230 305, 306
Everett *v.* London Assurance (1865), 19 C.B.N.S. 126; 29 Digest 321, *2634;* 34 L.J.C.P. 299 205, 211, 213

Fairman *v.* Perpetual Investment Building Society, [1923] A.C. 74; 36 Digest 37, *213;* 92 L.J.K.B. 50; 128 L.T. 386 67, 79, 526, 531
Farley *v.* Westminster Bank, Ltd., *Re* Ashton's Estate, Westminster Bank, Ltd., *v.* Farley, [1939] A.C. 430; [1939] 3 All E.R. 491; Digest Supp.; 108 L.J.Ch. 307; 161 L.T. 103 315, 319
Feay *v.* Barnwell, [1938] 1 All E.R. 31; Digest Supp. 278, 279, 292
Fenton *v.* Thorley & Co., Ltd., [1903] A.C. 443; 42 Digest 648, *543;* 72 L.J.K.B. 787; 89 L.T. 314; 5 W.C.C. 1 414, 421
Fielden *v.* Morley Corpn., [1900] A.C. 133; 38 Digest 120, *864;* 69 L.J.Ch. 314; 82 L.T. 29; *affg.* S.C. Fielding *v.* Morley, [1899] 1 Ch. 1 67, 75, 76, 90, 92, 414, 421
Fisher *v.* Oldham Corpn., [1930] 2 K.B. 364; Digest Supp.; 99 L.J.K.B. 569; 143 L.T. 281 391, 403
Flint *v.* Lovell, [1935] 1 K.B. 354; Digest Supp.; 104 L.J.K.B. 199; 152 L.T. 231 8, 9, 11, 297, 298
Foley *v.* Classique Coaches, Ltd., [1934] 2 K.B. 1; Digest Supp.; 103 L.J.K.B. 550; 151 L.T. 242 15, 26, 29
Foley (Lady) *v.* Fletcher (1858), 3 H. & N. 769; 28 Digest 65, *336;* 28 L.J.Ex. 100; 33 L.T.O.S. 11 112, 113, 116, 119, 120, 121
Fowke *v.* Fowke, [1938] Ch. 774; [1938] 2 All E.R. 638; Digest Supp.; 107 L.J.Ch. 350; 159 L.T. 8 335, 336, 339, 342
Fowler *v.* Fowler (1859), 4 De G. & J. 250; 35 Digest 134, *340* 430, 433
Fraser *v.* Driscoll (1916), 9 B.W.C.C. 264; 34 Digest 387, *3136* 343, 345
Freeborn *v.* Leeming, [1926] 1 K.B. 160; 38 Digest 130, *955;* 95 L.J.K.B. 114; 134 L.T. 117 67, 77
French (L.) & Co. *v.* Leeston Shipping Co., [1922] 1 A.C. 451; 12 Digest 612, *5054;* 91 L.J.K.B. 655; 127 L.T. 169 34, 57
Frost *v.* Knight (1872), L.R. 7 Exch. 111; 12 Digest 340, *2841;* 41 L.J.Ex. 78; 26 L.T. 77 15

Galloway *v.* Galloway (1914), 30 T.L.R. 531; 27 Digest 224, *1948* 335, 336, 342
Gillow *v.* Durham County Council, [1913] A.C. 54; 19 Digest 560, *32;* 82 L.J.K.B. 206; 107 L.T. 689 67, 80, 82, 87
Goodsell *v.* Lloyds (Owners), [1914] 3 K.B. 1001; 34 Digest 444, *3636;* 83 L.J.K.B. 1733; 111 L.T. 784; 7 B.W.C.C. 631 344
Graigola Merthyr Co., Ltd. *v.* Swansea Corpn., [1929] A.C. 344; 38 Digest 113, *804;* 98 L.J.Ch. 233; 140 L.T. 505 67, 76
Grand Trunk Ry. Co. of Canada *v.* Jennings (1888), 13 App. Cas. 800; 36 Digest 139, *936;* 58 L.J.P.C. 1; 59 L.T. 679 279, 291
Grant *v.* Australian Knitting Mills, Ltd., [1936] A.C. 85; Digest Supp.; 105 L.J.P.C. 6; 154 L.T. 18 526, 537
Graves *v.* Legg (1854), 9 Exch. 709; 12 Digest 416, *3351;* 23 L.J.Ex. 228; 23 L.T.O.S. 254; *subsequent proceedings, sub nom.* Greaves *v.* Legg (1856), 11 Exch. 642; *sub nom.* Graves *v.* Legg (1857), 2 H. & N. 210 380, 382
Greenock Corpn. *v.* Caledonian Ry. Co., Greenock Corpn. *v.* Glasgow & South Western Ry. Co., [1917] A.C. 556; 36 Digest 104, *700;* 86 L.J.P.C. 185; 117 L.T. 483 245, 248
Greenwood *v.* Atherton, [1939] 1 K.B. 388; [1938] 4 All E.R. 686; Digest Supp.; 108 L.J.K.B. 165; 160 L.T. 37 67, 72, 82, 89
Griffiths *v.* Dudley (Earl) (1882), 9 Q.B.D. 357; 36 Digest 136, *903;* 51 L.J.Q.B. 543; 47 L.T. 10 279, 296
Groves *v.* Wimborne (Lord), [1898] 2 Q.B. 402; 34 Digest 218, *1815;* 67 L.J.Q.B. 862; 79 L.T. 284 279, 282, 283, 286, 365, 366, 367, 369
Gutsell *v.* Reeve, [1936] 1 K.B. 272; Digest Supp.; 105 L.J.K.B. 213; 154 L.T. 1 470, 473

Hagen, The, [1908] P. 189; Digest Supp.; 77 L.J.P. 124; 98 L.T. 891 159, 165
Hamlyn & Co. *v.* Wood & Co., [1891] 2 Q.B. 488; 12 Digest 610, *5042;* 60 L.J.Q.B. 734; 65 L.T. 286 205, 208, 335, 339, 449, 453
Hardy *v.* Central London Ry. Co., [1920] 3 K.B. 459; 36 Digest 71, *457;* 89 L.J.K.B. 1187; 124 L.T. 136 515, 518
Harnett *v.* Bond, [1925] A.C. 669; 33 Digest 268, *1869;* 94 L.J.K.B. 569; 133 L.T. 482; *affg.*, [1924] 2 K.B. 517 391, 404
Harnett *v.* Fisher, [1927] A.C. 573; Digest Supp.; 96 L.J.K.B. 856; 137 L.T. 602 67, 75, 77, 78
Harris *v.* Perry & Co., [1903] 2 K.B. 219; 8 Digest 11, *44;* 72 L.J.K.B. 725; 89 L.T. 174 526, 533
Hawkes *v.* Torquay Corpn., [1938] 4 All E.R. 16; Digest Supp. 67, 90
Helby *v.* Matthews, [1895] A.C. 471; 3 Digest 93, *245;* 64 L.J.Q.B. 465; 72 L.T. 841 15, 17, 27
Henderson *v.* Stevenson (1875), L.R. 2 Sc. & Div. 470; 8 Digest 127, *855;* 32 L.T. 709 172, 173, 174
Hennessy *v.* Wright (1888), 21 Q.B.D. 509; 18 Digest 168, *1210;* 57 L.J.Q.B. 530; 59 L.T. 323 437, 438, 439
Henshall *v.* Porter, [1923] 2 K.B. 193; 25 Digest 419, *229;* 92 L.J.K.B. 866; 129 L.T. 443 470, 471, 472
Herschthal *v.* Stewart & Ardern, Ltd., [1940] 1 K.B. 155; [1939] 4 All E.R. 123; Digest Supp.; 161 L.T. 331 526, 537
Heydon's Case (1584), 3 Co. Rep. 7a; 42 Digest 614, *143* 414, 423
Hicks *v.* Newport, Abergavenny & Hereford Ry. Co. (1857), 4 B. & S. 403, n.; 36 Digest 139, *935* 279, 292
Hillas & Co., Ltd. *v.* Arcos., Ltd. (1932), 147 L.T. 503; Digest Supp. 15, 16, 26, 28
Hood *v.* Anchor Line (Henderson Brothers), [1918] A.C. 837; 8 Digest 104, *695;* 87 L.J.P.C. 156; 119 L.T. 684 172, 174
Horrocks, *Re*, Taylor *v.* Kershaw, [1939] P. 198; [1939] 1 All E.R. 579; Digest Supp.; 108 L.J.P. 86; 160 L.T. 324 194, 195, 204
Howard-Houlder & Partners, Ltd. *v.* Manx Isles S.S. Co., [1923] 1 K.B. 110; Digest Supp.; 92 L.J.K.B. 233; 128 L.T. 347 34, 58
Hoye *v.* Bush (1840), 1 Man. & G. 775; 14 Digest 187, *1673;* 10 L.J.M.C. 168 391, 392, 398

PAGES

Hughes *v.* **Vargas** (1893), 9 T.L.R. 551 ; 22 Digest 393, *4015* 437, 438, 439
Hunter *v.* **A.-G.,** [1899] A.C. 309 ; 8 Digest 291, *687 ;* 68 L.J.Ch. 449 ; 80 L.T. 732 ; *revsg.* S.C. *sub nom. Re* Hunter, Hood *v.* A.G., [1897] 2 Ch. 105.. .. 194, 195, 196
Hyman *v.* **Hyman,** [1929] A.C. 601 ; Digest Supp. ; 98 L.J.P. 81 ; 141 L.T. 329 335, 339

Inchbald *v.* Western Neilgherry Coffee, Tea, & Cinchona Plantation Co. Ltd. (1864), 17 C.B.N.S. 733 ; 1 Digest 542, *1952 ;* 34 L.J.C.P. 15 ; 11 L.T. 345 .. 34, 39, 41, 46, 59
Income Tax Special Purposes Comrs. *v.* Pemsel, [1891] A.C. 531 ; 8 Digest 241, *1 ;* 61 L.J.Q.B. 265 ; 65 L.T. 621 ; 3 Tax Cas. 53 .. .. 315, 316, 318
Indermaur *v.* Dames (1866), L.R. 1 C.P. 274 ; 36 Digest 35, *208 ;* 35 L.J.C.P. 184 ; 14 L.T. 484 ; *affd.* (1867), L.R. 2 C.P. 311 .. .. 66, 69, 74, 79
Inland Revenue Comrs. *v.* Glasgow & South Western Ry. Co. (1887), 12 App. Cas. 315 ; 11 Digest 236, case *1267i ;* 56 L.J.P.C. 82 .. .. 481, 482, 484, 485, 486, 494, 498

Jackson *v.* Smithson (1846), 15 M. & W. 563 ; 2 Digest 243, *273 ;* 15 L.J.Ex. 311 ; 7 L.T.O.S. 231 .. .. 515, 519
Jacques *v.* Harrison (1883), 12 Q.B.D. 136 ; Digest. Practice, 391, *948 ;* 53 L.J.Q.B. 137 ; 50 L.T. 246 ; *subsequent proceedings* (1884), 12 Q.B.D. 165 .. .. .. 231, 235
James *v.* Allen (1817), 3 Mer. 17 ; 8 Digest 293, *708* 193, 194, 196, 197, 201
Jamieson *v.* St. Flanan Coal Co., Ltd., [1935] S.C. 138 ; Digest Supp. ; 27 B.W.C.C. Supp. 187 .. .. 343, 344, 350, 353, 354
Jan Frederick, The (1804), 5 Ch. Rob. 128 ; 37 Digest 585, *202* 371, 378
Jarman's Estate, *Re,* Leavers *v.* Clayton (1878), 8 Ch. D. 584 ; 8 Digest 295, *727 ;* 47 L.J. Ch. 675 ; 39 L.T. 89 194
Jervis *v.* Howle & Talke Colliery Co., Ltd., [1937] Ch. 67 ; [1936] 3 All E.R. 193 ; Digest Supp. ; 106 L.J. Ch. 34 ; 155 L.T. 572 .. .. 430, 435, 436
Johannesburg, The, [1907] P. 65 ; 38 Digest 103, *738 ;* 76 L.J.P. 67 ; 96 L.T. 464 .. 67, 77, 89
Jones *v.* Inland Revenue Comrs., [1920] 1 K.B. 711 ; 28 Digest 108, *667 ;* 89 L.J.K.B. 129 ; 121 L.T. 611 ; 7 Tax Cas. 310 .. .. 112, 116
Jubb *v.* Hull Dock Co. (1846), 9 Q.B. 443 ; 11 Digest 128, *174 ; sub nom.* R. *v.* Hull Dock Co., 15 L.J.Q.B. 403 ; 8 L.T.O.S. 293 .. .. 481, 493, 494

Kahn *v.* Aircraft Industries Corpn., Ltd., [1937] 3 All E.R. 476 ; Digest Supp. 34, 47
Kearns *v.* Bedford (1934), 50 T.L.R. 348 ; Digest Supp. 181, 187
Kidston & Co. *v.* Monceau Ironworks Co. (1902), 86 L.T. 556 ; 12 Digest 415, *3345* .. 380, 382
Knott *v.* London County Council, [1934] 1 K.B. 126 ; Digest Supp. ; 103 L.J.K.B. 100 ; 150 L.T. 91 .. .. 515, 519
Kohnstamm (R. & A.), Ltd. *v.* Krumm (Ludwig) (London), Ltd., [1940] 2 K.B. 359 ; [1940] 3 All E.R. 84 ; Digest Supp. 259, 267
Kronprinsessan Margareta, The, The Parana, [1921] 1 A.C. 486 ; 37 Digest 636, *866 ;* 90 L.J.P. 145 ; 124 L.T. 609 ; *affg.* The Kronprinsessan Margareta, The Thai, [1917] P. 114 .. .. 371, 378

Lanarkshire & Dumbartonshire Ry. Co. *v.* Main (1895), 35 L.T. 93 ; 11 Digest 126, case *k* 481, 482
Law *v.* Harragin (1917), 33 T.L.R. 381 ; 27 Digest 224, *1949* 335, 336, 342
Lever Brothers, Ltd. *v.* Caton (1921), 37 T.L.R. 664 ; 31 Digest 583, *7318* 223, 225
Liddle *v.* North Riding of Yorkshire County Council, [1934] 2 K.B. 101 ; Digest Supp. ; 103 L.J.K.B. 527 ; 151 L.T. 202 .. .. 515, 518
Lloyd *v.* Cook, Goudge *v.* Broughton, Simson *v.* Miatt, Bartram *v.* Brown, Barker *v.* Hutson, [1929] 1 K.B. 103 ; Digest Supp. ; 97 L.J.K.B. 657 ; 139 L.T. 452 181, 186, 187
Lochgelly Iron & Coal Co., Ltd. *v.* M'Mullan, [1934] A.C. 1 ; Digest Supp. ; 102 L.J.P.C. 123 ; 149 L.T. 526 ; 26 B.W.C.C. 463 .. .. 279, 283
Logan *v.* Bank of Scotland (No. 2), [1906] 1 K.B. 141 ; 11 Digest 477, *1310 ;* 75 L.J.K.B. 218 ; 94 L.T. 153 .. .. 159, 161
London Founders Assocn. *v.* Clarke (1888), 20 Q.B.D. 576 ; 42 Digest 827, *361 ;* 57 L.J.Q.B. 291 ; 59 L.T. 93 .. .. 563, 567
Lovibond (John) & Sons, Ltd. *v.* Vincent, [1929] 1 K.B. 687 ; Digest Supp. ; 98 L.J.K.B. 402 ; 141 L.T. 116 181
Lowery *v.* Walker, [1911] A.C. 10 ; 2 Digest 241, *261 ;* 80 L.J.K.B. 138 ; 103 L.T. 674 ; *revsg.,* [1910] 1 K.B. 173 ; [1909] 2 K.B. 433 .. .. 515, 519, 521
Ludlow, *Re,* Bence-Jones *v.* A.-G. (1923), 93 L.J. Ch. 30 ; Digest Supp. 193, 196, 197, 198, 201, 202
Lyles *v.* Southend-on-Sea Corpn., [1905] 2 K.B. 1 ; 38 Digest 102, *733 ;* 74 L.J.K.B. 484 ; 92 L.T. 568 .. .. 67, 75, 76, 89, 90
Lygo *v.* Newbold (1854), 9 Exch. 302 ; 36 Digest 49, *307 ;* 23 L.J.Ex. 108 ; 22 L.T.O.S. 226 .. .. 526, 533
Lyons, Sons & Co. *v.* Gulliver, [1914] 1 Ch. 631 ; 26 Digest 428, *1475 ;* 83 L.J. Ch. 281 ; 110 L.T. 284.. .. .. 355, 357

Mackalley's Case (1611), 9 Co. Rep. 61 b ; 14 Digest 313, *3288* 391, 403
M'Alister (or Donoghue) *v.* Stevenson, [1932] A.C. 562 ; Digest Supp. ; 101 L.J.P.C. 119 ; 147 L.T. 281.. .. .. 526, 537, 538
McArdle *v.* Egan (1934), 150 L.T. 412 ; Digest Supp. 391, 398
Macduff, *Re,* Macduff *v.* Macduff, [1896] 2 Ch. 451 ; 8 Digest 296, *731 ;* 65 L.J. Ch. 700 ; 74 L.T. 706 .. .. 193, 195, 197, 198
McEntire *v.* Crossley Brothers, [1895] A.C. 457 ; 39 Digest 483, *1033 ;* 64 L.J.P.C. 129 ; 72 L.T. 731 .. .. 15, 27
Mackay *v.* Dick (1881), 6 App. Cas. 251 ; 12 Digest 431, *3494* 34, 39, 60
Maclennan, *Re,* Few *v.* Byrne, [1939] Ch. 750 ; [1939] 3 All E.R. 81 ; Digest Supp. ; 160 L.T. 612.. .. .. 430, 436
M'Naghten's Case (1843), 10 Cl. Fin. 200 ; 14 Digest 56, *229* 361, 362
Maine Spinning Co. *v.* Sutcliffe & Co. (1917), 34 T.L.R. 154 ; 39 Digest 546, *1562 ;* 87 L.J.K.B. 382 ; 118 L.T. 351 .. .. 464, 468, 469
Malfroot *v.* Noxal, Ltd. (1935), 51 T.L.R. 551 ; Digest Supp. 526, 537, 538
Marie Anne, The, Rothery 126 .. .. 371, 378
Marsh *v.* Parker (Robert), Ltd. (1932), 25 B.W.C.C. 197 ; Digest Supp. 101, 103
Marshall *v.* London Passenger Transport Board, [1936] 3 All E.R. 83 ; Digest Supp. 228, 229, 230
Marshall *v.* York, Newcastle & Berwick Ry. Co. (1851), 11 C.B. 655 ; 8 Digest 121, *811 ;* 21 L.J.C.P. 34 ; 18 L.T.O.S. 94 .. .. 526, 533
May *v.* Burdett (1846), 9 Q.B. 101 ; 36 Digest 118, *789 ;* 16 L.J.Q.B. 64 ; 7 L.T.O.S. 253 515, 519
May *v.* May, [1929] 2 K.B. 386 ; Digest Supp. ; 98 L.J.K.B. 770 ; 141 L.T. 629 .. 335, 339, 341
May & Butcher, Ltd. *v.* R., [1934] 2 K.B. 17, n. ; Digest Supp. ; 103 L.J.K.B. 556, n. ; 151 L.T. 246, n. 15, 26, 29

PAGES

Mayfair Property Co., *Re*, Bartlett *v.* Mayfair Property Co., [1898] 2 Ch. 28 ; 10 Digest 734, *4593* ; 67 L.J. Ch. 337 ; 78 L.T. 302 .. 414, 423
Menzies *v.* United Motor Finance Corpn., Ltd., [1940] 1 K.B. 559 ; [1940] 1 All E.R. 549 ; Digest Supp. ; 162 L.T. 175 .. 270, 272, 273
Mersey Docks & Harbour Board *v.* Procter, [1923] A.C. 253 ; 36 Digest 15, *59 ;* 92 L.J.K.B. 479 ; 129 L.T. 34 .. 515, 518
Metcalf, *Re*, Metcalf *v.* Blencowe, [1903] 2 Ch. 424 ; 39 Digest 161, *529 ;* 72 L.J. Ch. 786 ; 88 L.T. 727 .. 93, 94
Metropolitan Water Board *v.* Dick, Kerr & Co., [1918] A.C. 119 ; 12 Digest 399, *3233 ;* 87 L.J.K.B. 370 ; 117 L.T. 766 .. 464, 467
Mitchell *v.* Aberdeen Insurance Committee, [1918] S.C. 415 ; 38 Digest 115, case *825vi* 66, 72
Mizen Bros. *v.* Mitcham Urban District Council (1929), *Estates Gazette* Digest, 1929, p. 258 ; reprinted, *Estates Gazette*, Jan. 25, 1941, p. 102 .. 167, 168, 170, 481, 484, 488, 490, 501
Monk *v.* Warbey, [1935] 1 K.B. 75 ; Digest Supp. ; 104 L.J.K.B. 153 ; 152 L.T. 194 365, 367, 369
Morcock, The (1889), 14 P.D. 64 ; 12 Digest 611, *5048* ; 58 L.J.P. 73 ; 60 L.T. 654 .. 335, 339
Morgan *v.* Liverpool Corpn., [1927] 2 K.B. 131 ; Digest Supp. ; 96 L.J.K.B. 234 ; 136 L.T. 622 .. 153, 154, 156
Morice *v.* Durham (Bp.) (1805), 10 Ves. 522 ; 8 Digest 293, *705 ; on appeal from* 9 Ves. 399 193, 194, 196, 198
Mure *v.* Kaye (1811), 4 Taunt. 34 ; 14 Digest 177, *1554* .. 391, 399, 400, 401, 402
Murton v. Aldis (1929), 141 L.T. 168 ; Digest Supp. .. 223, 225

National Arms and Ammunition Co., *Re* (1885), 28 Ch.D. 474 ; 10 Digest 1053, *7363 ;* 54 L.J. Ch. 673 ; *sub nom. Re* National Arms and Ammunition Co., Ltd., *Ex p.* Birmingham Corpn., 52 L.T. 237 .. 409, 411
Nelson *v.* Cookson, [1940] 1 K.B. 100 ; [1939] 4 All E.R. 30 ; Digest Supp. ; 109 L.J.K.B. 154 ; 161 L.T. 346 .. 67, 77
Nelson Line (Liverpool), Ltd. *v.* Nelson & Sons, Ltd., [1908] A.C. 16 ; 41 Digest 474, *3056 ;* 77 L.J.K.B. 82 ; 97 L.T. 812 .. 205, 208
Newbould *v.* A.-G., [1931] P. 75 ; Digest Supp. ; 100 L.J.P. 54 ; 144 L.T. 728 .. 335
Nichols *v.* Marsland (1876), 2 Ex. D. 1 ; 36 Digest 104, *695 ;* 46 L.J.Q.B. 174 ; 35 L.T. 725 245, 248
Noble *v.* Harrison, [1926] 2 K.B. 332 ; 36 Digest 189, *316 ;* 95 L.J.K.B. 813 ; 135 L.T. 325 .. 355, 357
Nunan *v.* Southern Ry. Co., [1924] 1 K.B. 223 ; 36 Digest 135, *896* ; 93 L.J.K.B. 140 ; 130 L.T. 131 ; *affg.*, [1923] 2 K.B. 703 .. 172, 173

O'Brien *v.* Lewis (1863), 3 De G. J. & Sm 606 ; 42 Digest 276, *3099 ;* 32 L.J. Ch. 665 ; 8 L.T. 683 .. 275, 276
Orleans Motor Co., Ltd., *Re*, [1911] 2 Ch. 41 ; 10 Digest 752, *4699 ;* 80 L.J.Ch. 477 ; *sub nom. Re* Orleans Motor Co., Ltd., Smyth *v.* Orleans Motor Co., Ltd., 104 L.T. 627 545, 548

P. v. P., [1916] 2 I.R. 400 ; 27 Digest 528 ; case *5704i* .. 335, 339
Page *v.* Skelt, [1940] 2 All E.R. 419 ; Digest Supp. .. 242
Pain *v.* Cobb (1931), 146 L.T. 13 ; Digest Supp. .. 181
Palmer *v.* Grand Junction Ry. Co. (1839), 4 M. & W. 749 ; 38 Digest 110, *789 ;* 8 L.J.Ex. 129 .. 67, 91
Parfitt *v.* Lawless (1872), L.R. 2 P. & D. 462 ; 22 Digest 26, *57 ;* 41 L.J.P. & M. 68 ; 27 L.T. 215 .. 270, 273
Parker *v.* South Eastern Ry. Co., Gabell *v.* South Eastern Ry. Co. (1877), 2 C.P.D. 416 ; 8 Digest 129, *866 ;* 46 L.J.Q.B. 768 ; 36 L.T. 540 .. 172, 173, 174
Paul (R. & W.), Ltd. *v.* Wheat Commission, [1937] A.C. 139 ; [1936] 2 All E.R. 1243 ; Digest Supp. ; 105 L.J.K.B. 563 ; 155 L.T. 305 .. 67, 72, 76
Pearson *v*, Scott (1878), 9 Ch.D. 198 ; 42 Digest 72, *641 ;* 38 L.T. 747 ; *sub nom.* Pierson *v.* Scott, 47 L.J.Ch. 705 .. 563, 565
Penny *v.* Penny (1868), L.R. 5 Eq. 227 ; 11 Digest 129, *185 ;* 37 L.J.Ch. 340 ; 18 L.T. 13 481, 495
Penton *v.* Southern Ry., [1931] 2 K.B. 103 ; Digest Supp. ; 100 L.J.K.B. 228 ; 144 L.T. 614 .. 172, 174
Perrin *v.* Dickson, [1930] 1 K.B. 107 ; Digest Supp. ; 98 L.J.K.B. 683 ; 142 L.T. 29 ; 14 Tax Cas. 608 ; *affg.*, [1929] 2 K.B. 85 .. 112, 113, 114, 116, 117, 118, 119, 121, 122, 123
Phillips *v.* Britannia Hygienic Laundry Co., [1923] 2 K.B. 832 ; 42 Digest 870, *197 ;* 93 L.J.K.B. 5 ; 129 L.T. 777 .. 365, 366, 367
Pilcher, *Re*, Pilcher *v.* Hinds (1879), 11 Ch.D. 905 ; Digest, Practice, 845, *3920 ;* 48 L.J.Ch. 587 ; 40 L.T. 832 .. 249, 251
Planché *v.* Colburn (1831), 8 Bing. 14 ; 12 Digest 350, *2906* ; 1 L.J.C.P. 7 .. 34, 58
Policy No. 6402 of the Scottish Equitable Life Assurance Society, *Re*, [1902] 1 Ch. 282 ; 29 Digest 375, *3007 ;* 71 L.J.Ch. 189 ; 85 L.T. 720 .. 321, 323
Pope *v.* Fraser and Southern Rolling & Wire Mills, Ltd. (1938), 55 T.L.R. 324 ; Digest Supp. .. 355, 357
Porter *v.* Freudenberg, Kreglinger *v.* Samuel (S.) & Rosenfeld, *Re* Merten's Patents, [1915] 1 K.B. 858 ; Digest, Practice, 329, *481* ; 84 L.J.K.B. 1001 ; 112 L.T. 313 .. 231, 232
Prickett *v.* Badger (1856), 1 C.B.N.S. 296 ; 1 Digest 509, *1754 ;* 26 L.J.C.P. 33, 34, 41, 45, 46, 58, 65
Pym *v.* Great Northern Ry. Co. (1863), 4 B. & S. 396 ; 36 Digest 129, *859 ;* 32 L.J.Q.B. 377 ; 8 L.T. 734 .. 279, 291

R. *v.* Howarth (1828), 1 Mood. C.C. 207 ; 14 Digest 172, *1498* .. 391, 403
R. *v.* International Trustee for Protection of Bondholders Aktiengesellschaft, [1937] A.C. 500 ; [1937] 2 All E.R. 164 ; Digest Supp. ; 106 L.J.K.B. 236 ; 156 L.T. 352 159, 163
R. *v.* Kupfer, [1915] 2 K.B. 321 ; 2 Digest 170, *385 ;* 84 L.J.K.B. 1021 ; 112 L.T. 1138 259, 260, 265
R. *v.* Weil (1882), 9 Q.B.D. 701 ; 14 Digest 178, *1562 ;* 53 L.J.M.C. 74 ; 47 L.T. 630 391, 398, 399, 400, 403
Read *v.* Great Eastern Ry. Co. (1868), L.R. 3 Q.B. 555 ; 36 Digest 136, *902 ;* 37 L.J.Q.B. 278 ; 18 L.T. 822 .. 279, 296
Rees *v.* Imperial Navigation Coal Co., Ltd. (1927), 20 B.W.C.C. 287 ; Digest Supp. .. 344, 353
Reigate *v.* Union Manufacturing Co. (Ramsbottom), [1918] 1 K.B. 592 ; 12 Digest 611, *5052 ;* 87 L.J.K.B. 724 ; 118 L.T. 479 .. 34, 57
Rhodes, *Ex p.* (1809), 15 Ves. 539 ; 4 Digest 523, *4784* .. 275, 276
Rhodes *v.* Forwood (1876), 1 App. Cas. 256 ; 1 Digest 540, *1944 ;* 47 L.J.Q.B. 396 ; 34 L.T. 890 .. 34, 56
Ricket *v.* Metropolitan Ry. Co. (Directors, etc.) (1867), L.R. 2 H.L. 175 ; 11 Digest 140, *265 ;* 36 L.J.Q.B. 205 ; 16 L.T. 542 ; *on appeal from* (1865), 34 L.J.Q.B. 257 481, 482, 494, 498
Rishton *v.* Cobb (1839), 5 My. & Cr. 145 ; 44 Digest 220, *442* ; 9 L.J.Ch. 110 .. 329, 332

PAGES
Roast *v.* Roast, [1938] P. 8 ; [1937] 4 All E.R. 423 ; Digest Supp. ; 107 L.J.P. 21 ; 157 L.T. 596 .. .. .. 305, 306
Robinson *v.* South Australia State (No. 2), [1931] A.C. 704 ; Digest Supp. ; 100 L.J.P.C. 183 ; 145 L.T. 408 .. .. .. 437, 438, 440, 442
Rose *v.* Ford, [1937] A.C. 826 ; [1937] 3 All E.R. 359 ; Digest Supp. ; 106 L.J.K.B. 576 ; 157 L.T. 174 .. .. .. 7, 8, 9, 11, 12, 278, 279, 292, 293
Roumanian, The, [1916] 1 A.C. 124 ; 37 Digest 593, *291* ; 85 L.J.P.C. 33 ; 114 L.T. 3 ; *affg.* [1915] P. 26 .. .. .. 371, 378
Russell *v.* Rudd, [1923] A.C. 309 ; 34 Digest 440, *3588* ; 92 L.J.K.B. 429 ; 129 L.T. 193 ; 16 B.W.C.C. 358 .. .. .. 343, 348
Russell *v.* Russell, [1924] A.C. 687 ; Digest Supp. ; 93 L.J.P. 97 ; 131 L.T. 482 .. .. 305, 306

St. Anne's Well Brewery Co. *v.* Roberts (1928), 140 L.T. 1 ; Digest Supp. 245, 247
St. Helens Colliery Co., Ltd. *v.* Hewitson, [1924] A.C. 59 ; 34 Digest 280, *2361* ; 93 L.J.K.B. 177 ; 130 L.T. 291 ; 16 B.W.C.C. 230 .. .. .. 343, 348
Schaffer *v.* Ross, [1939] 4 All E.R. 363 ; Digest Supp. 181
Schmitz (Schmidt) *v.* Van Der Veen & Co. (1915), 84 L.J.K.B. 861 ; 2 Digest 172, *387* ; 112 L.T. 991 .. .. .. 259, 260, 268
Scott *v.* Summerlee Iron Co., [1931] A.C. 37 ; Digest Supp. ; 99 L.J.P.C. 170 ; 143 L.T. 726 ; 23 B.W.C.C. 312 .. .. .. 343, 344, 349, 350, 354
Script Phonography Co. *v.* Gregg (1890), 59 L.J.Ch. 406 ; Digest, Pleading, 133, *1210* .. 249, 250
Secretary of State in Council of India *v.* Scoble, [1903] A.C. 299 ; 28 Digest 65, *337* ; 72 L.J.K.B. 617 ; 89 L.T. 1 ; *sub nom.* Scoble *v.* Secretary of State for India, 4 Tax Cas. 618 .. .. .. 112, 113, 116, 119, 120
Sedleigh-Denfield *v.* O'Callagan (St. Joseph's Society for Foreign Missions Trustees), [1940] A.C. 880 ; [1940] 3 All E.R. 349 ; Digest Supp. ; *revsg.* S.C. *sub nom.* Sedleigh-Denfield *v.* St. Joseph's Society for Foreign Missions, [1939] 1 All E.R. 725 355, 357
Seymour *v.* Reed, [1927] A.C. 554 ; Digest Supp. ; 96 L.J.K.B. 839 ; 137 L.T. 312 ; 11 Tax Cas. 625 ; *revsg.*, [1927] 1 K.B. 90 .. .. .. 512, 513
Sharpington *v.* Fulham Guardians, [1904] 2 Ch. 449 ; 38 Digest 109, *783* ; 73 L.J.Ch. 777 ; 91 L.T. 739 .. .. .. 67, 75
Shelburne (Countess Dowager) *v.* Inchiquin (Earl) (1784), 1 Bro. C.C. 338 ; 35 Digest 137, *356* ; *on appeal sub nom.* Inchiquin (Earl) *v.* Fitzmaurice (1785), 5 Bro. Parl. Cas. 166 430, 433
Shepherd *v.* Hills (1855), 11 Exch. 55 ; 32 Digest 395, *755* ; 25 L.J.Ex. 6 ; 4 L.T. 742 470, 473
Sifton *v.* Sifton, [1938] A.C. 656 ; [1938] 3 All E.R. 435 ; Digest Supp. ; 107 L.J.P.C. 97 ; 159 L.T. 289 .. .. .. 539, 542, 543
Sigsworth, *Re*, Bedford *v.* Bedford, [1935] Ch. 89 ; Digest Supp. ; 104 L.J.Ch. 46 ; 152 L.T. 329 .. .. .. 361, 363
Simpson *v.* Lamb (1856), 17 C.B. 603 ; 1 Digest 494, *1697* ; 25 L.J.C.P. 113 ; 26 L.T.O.S. 203 .. .. .. 34, 56
Sinclair's Life Policy, *Re*, [1938] Ch. 799 ; [1938] 3 All E.R. 124 ; Digest Supp. ; 107 L.J.Ch. 405 ; 159 L.T. 189 .. .. .. 321, 324, 325, 327, 328
Skinner *v.* City of London Marine Insurance Corpn. (1885), 14 Q.B.D. 882 ; 42 Digest 827, *363* ; 54 L.J.Q.B. 437 ; 53 L.T. 191 .. .. .. 563, 567
Smith *v.* Baker & Sons, [1891] A.C. 325 ; 13 Digest 527, *789* ; 60 L.J.Q.B. 683 ; 65 L.T. 467 476
Smith *v.* Reynolds (1892), 8 T.L.R. 391 ; 42 Digest 826, *350* ; 66 L.T. 808 ; *affd.* (1893), 9 L.T.R. 494 .. .. .. 563, 567, 568
Société Générale de Paris *v.* Dreyfus Bros. (1885), 29 Ch.D. 239 ; (1887), 37 Ch.D. 215 ; Digest Practice, 339, *574* ; 57 L.J.Ch. 276 ; 58 L.T. 573 .. .. .. 159, 165
Sorensen *v.* R., The Baltica (1858), 11 Moo. P.C.C. 141 ; 37 Digest 579, *115* ; 30 L.T.O.S. 342 ; *revsg.* (1855), Spinks, 264 .. .. .. 371, 378
Southcote's Case (1601), 4 Co. Rep. 83b ; 8 Digest 19, *96* 526, 533
Southfield, The (1915), [1917] A.C. 390, n. ; 37 Digest 569, *6* ; 85 L.J.P. 78 ; 113 L.T. 655 .. .. .. 371, 378
Stennett *v.* Hancock & Peters, [1939] 2 All E.R. 578 ; Digest Supp. 526, 537
Stevenson (Hugh) & Sons *v.* Akt. für Cartonnagen Industrie, [1918] A.C. 239 ; 2 Digest 177, *416* ; 87 L.J.K.B. 416 ; 118 L.T. 126 259

Tierney *v.* Smith (1936), Feb. 20, Unreported 66, 70, 74
Townshend (Marquis) *v.* Stangroom, Stangroom *v.* Townshend (Marquis) (1801), 6 Ves. 328 ; 35 Digest 134, *336* 430, 433
Trollope (George) & Sons *v.* Caplan, [1936] 2 K.B. 382 ; [1936] 2 All E.R. 842 ; Digest Supp. ; 105 L.J.K.B. 819 ; 155 L.T. 365 .. .. .. 33, 34, 40, 42, 43, 47, 65
Trollope (George) & Sons *v.* Martyn Bros., [1934] 2 K.B. 436 ; Digest Supp. ; 103 L.J.K.B. 634 ; 152 L.T. 88 33, 34, 37, 38, 39, 41, 42, 43, 44, 46, 47, 50, 52, 56, 58, 60, 62, 63, 65
Turner *v.* Goldsmith, [1891] 1 Q.B. 544 ; 1 Digest 541, *1946* ; 60 L.J.Q.B. 247 ; 64 L.T. 301 .. .. .. 34, 57, 60
Turner *v.* Thompson (1888), 13 P.D. 37 ; 11 Digest 332, *214* ; 58 L.T. 387 .. .. 335, 338

Upjohn *v.* Hitchens, Upjohn *v.* Ford, [1918] 2 K.B. 48 ; 31 Digest 361, *5075* ; 87 L.J.K.B. 1205 ; 119 L.T. 180 .. .. .. 205, 212

Venables *v.* Department of Agriculture for Scotland, [1932] S.C. 573 ; Digest Supp. 481, 482, 490, 501
Venn *v.* Tedesco, [1926] 2 K.B. 227 ; 36 Digest 131, *871* ; 95 L.J.K.B. 866 ; 135 L.T. 108 67, 77
Vesta, The, etc., [1921] 1 A.C. 774 ; 37 Digest 586, *219* ; 90 L.J.P. 250 ; 125 L.T. 261 371, 378, 379
Von Brockdorff *v.* Malcolm (1885), 30 Ch. D. 172 ; 44 Digest 562, *3798* ; 55 L.J.Ch. 121 ; 53 L.T. 263 .. .. .. 194, 196

Wackerbarth *v.* Masson (1812), 3 Camp. 270 ; 39 Digest 555, *1631* 464, 468, 469
Wagstaff, *Re*, Wagstaff *v.* Jalland, [1908] 1 Ch. 162 ; 44 Digest 874, *7309* ; 77 L.J.Ch. 190 ; 98 L.T. 149 .. .. .. 329, 331
Wakefield *v.* Duckworth & Co., [1915] 1 K.B. 218 ; 42 Digest 364, *4159* ; 84 L.J.K.B. 335 ; 112 L.T. 130 .. .. .. 563, 565
Walker *v.* Baird, [1892] A.C. 491 ; 11 Digest 542, *469* ; 61 L.J.P.C. 92 ; 67 L.T. 513 .. 391, 401
Walters *v.* Smith (W. H.) & Son, Ltd., [1914] 1 K.B. 595 ; 14 Digest 177, *1549* ; 83 L.J.K.B. 335 ; 110 L.T. 345 .. .. .. 391, 398
Warren *v.* Warren, [1925] P. 107 ; Digest Supp. ; 94 L.J.P. 68 ; 133 L.T. 352 .. 305, 306
Watkins *v.* Naval Colliery Co. (1897), Ltd., [1912] A.C. 693 ; 34 Digest 741, *1173* ; 81 L.J.K.B. 1056 ; 107 L.T. 321 .. .. .. 279, 287
Weir *v.* Thomas & Abson (1914), 79 J.P 54 ; 38 Digest 106 *758* 67, 77

PAGES

West *v.* West (1911), 27 T.L.R. 476; 22 Digest 395, *4032* .. 437, 440
West India Telegraph Co. *v.* Home & Colonial Insurance Co. (1880), 6 Q.B.D. 51; 29 Digest 225, *1823;* 50 L.J.Q.B. 41; 43 L.T. 420 .. 205, 208
Westminster Fire Office *v.* Reliance Marine Insurance Co. (1903), 19 T.L.R. 668; 29 Digest 133, *853* .. 149. 152
Whistler *v.* Hancock (1878), 3 Q.B.D. 83; Digest, Pleading, 133, *1209;* 47 L.J.Q.B. 152; 37 L.T. 639 .. 249, 250
Williams *v.* Guest, Keen & Nettlefolds, Ltd. (1925), 133 L.T. 111; 34 Digest 453, *3718;* 18 B.W.C.C. 68 .. 343, 347, 348. 349, 353, 354
Williams *v.* Mersey Docks and Harbour Board, [1905] 1 K.B. 804; 36 Digest 131, *870;* 74 L.J.K.B. 481; 92 L.T. 444 .. 67, 77
Williams *v.* Williams, Williams *v.* Kershaw (1835), 5 Cl. & Fin. 111, n.; 8 Digest 297, *747;* 5 L.J.Ch. 84 .. 194, 195, 197
Williams' Settlement, *Re,* Williams Wynn *v.* Williams, [1922] 2 Ch. 750; 40 Digest 656, *1955;* 92 L.J.Ch. 101; 128 L.T. 110 .. 105, 110
Windsor *v.* Chalcraft, [1939] 1 K.B. 279; [1938] 2 All E.R. 751; Digest Supp.; 107 L.J.K.B. 609; 159 L.T. 104 .. 231, 232, 235
Wolverhampton New Waterworks Co. *v.* Hawkesford (1859), 6 C.B.N.S. 336; 42 Digest 752, *1768;* 28 L.J.C.P. 242; 33 L.T.O.S. 366 .. 364, 365, 366
Wombwell's Settlement, *Re,* Clarke *v.* Menzies, [1922] 2 Ch. 298; 27 Digest 457, *4752* 92 L.J.Ch. 18; 127 L.T. 295 .. 335, 336
Wood *v.* London County Council, [1940] 2 K.B. 642; [1940] 4 All E.R. 149; Digest Supp. 556, 559
Wreck Recovery and Salvage Co., *Re* (1880), 15 Ch.D. 353; 10 Digest 923, *6334;* 43 L.T. 190 .. 409, 411
Wringe *v.* Cohen, [1940] 1 K.B. 229; [1939] 4 All E.R. 241; Digest Supp.; 109 L.J.K.B. 227; 161 L.T. 366 .. 245, 247

Ydun, The, [1899] P. 236; 38 Digest 102, *732;* 81 L.T. 10; *affd.,* [1899] P. 342 67, 75, 76, 81, 82, 89

Zamora, The, [1916] 2 A.C. 77; 37 Digest 652, *1071;* 85 L.J.P. 89; 114 L.T. 626 443, 444, 446, 447
Zurich General Insurance Co. *v.* Livingstone, [1940] S.C. 406; Digest Supp. .. 124, 128

INDEX

PAGE

Act of God, snow falling from roof of building adjoinging highway, public nuisance 245

Action, stay, serving soldier, usual order 307

Admissibility, evidence, statement in writing by deceased person made while proceedings pending, statement by plaintiffs' employee, party interested 311

Adultery, confession by wife, expected child result of adultery, no proof of non-access 305

AGENCY.

Remuneration — Commission — Contract to pay commission on completion of sale of property—Willing purchaser found — Justification of refusal to complete—Transaction carried through by sale of shares in company and not by sale of company's property [LUXOR (EASTBOURNE), LTD. (IN LIQUIDATION) *v.* COOPER] 33

Agreement, sale of goods, price to be discharged "on hire-purchase terms," whether concluded agreement 14

——, separation, between husband and wife prior to nullity decree, whether enforceable 334

ALIENS.

Trading with the enemy — Guarantee by English company of debt due to neutral by German company—Whether payment under guarantee for benefit or in discharge of obligation of enemy—Trading with the Enemy Act, 1939 (*c.* 89), *s.* 1 (2) (*a*) [STOCKHOLMS ENSKILDA BANK AKTIEBOLAG *v.* SCHERING, LTD.] 257

Alterations, alterations and improvements not necessarily structural, payable out of capital 143

ANIMALS

Injuries by animals — Dog known to be dangerous — Trespasser — Customer of public-house acting reasonably [GOULD *v.* MCAULIFFE] .. 515

—— , valuation, annuities to several

Annuity, payments, capital or income in hands of third party 111

——, tax free, improper wording of deed, rectification, annuity paid in full for over 30 years 430

——, valuation, annuities to several persons free of tax, rights of survivorship, deferred annuities to infants, rate of income tax and allowances 93

Appeal, *ex parte* order made on insufficient disclosure of facts, right to have order set aside irrespective of merits of case 137

——, judgment for stated sum, refusal of relief under emergency legislation, right to stay of execution 310

Apprenticeship, conduct likely to lead to loss of time on part of other employees, breach of covenant in apprenticeship deed 552

Arrest, fugitive offender, necessity for indorsed or provisional warrant 390

Assessment, compensation, compulsory purchase, compensation for disturbance of business 166, 480

PAGE

——, ——, injurious affection, ribbon development 252

Assessment committee, clerk also town clerk, right to recover profit costs .. 549

Bicycle, red rear lamp not provided .. 188

Blackout, collision during, duty of pedestrian to look behind 188

Breach of warranty, hire purchase, machine bought by finance company, hirer claiming damages from makers 269

Broker and client, broker's right to indemnity, vendor repudiating contract 562

Building agreement, agreement made before outbreak of war and lease granted to nominees after outbreak of war, whether rent due under agreement or under lease, liability of lessees 241

Butchers, nuisance, passer-by injured by fat on pavement outside shop 355

Capital, expenditure payable out of, alterations and improvements to enable buildings to be let, alterations and improvements not necessarily structural 143

——, income or, annuity payments in hands of third party 111

——, ——, casual profits, damages, injury to land by improvements by river conservators, agreement apart from arbitration 104

Cargo, insurance, termination of risk, custom of port, cargo sorted by port authority after discharge from ship 149

CARRIERS.

Carriage of passengers—Passenger ticket—Conditions—Notice to passenger—Notice obliterated by date stamp [SUGAR *v.* LONDON, MIDLAND & SCOTTISH RAILWAY CO.] 172

Charitable purposes, residuary bequest, gift to "charitable or benevolent object or objects," validity 193

CHARITIES.

Religious purposes — Absolute discretion of trustee—" Educational or charitable or religious purposes for Roman Catholics in the British Empire " [*Re* WARD, PUBLIC TRUSTEE *v.* WARD] 315

——, *Gift to persons holding certain beliefs—Validity* [*Re* MYLNE, POTTER *v.* DOW] 405

C.i.f. contract, contract in common form, special clause as to service of notices added, condition precedent 380

Coal mine, regulation, statutory, deliberate breach by employee, civil liability of mine-owners 278

Commission, agent prevented from earning, wilful default of principal, just excuse 33

COMPANIES.

Debentures — Floating charge — Created within six months of winding up — Not for benefit of company — Validity — Companies Act, 1929 (*c.* 23), *s.* 266 [*Re* DESTONE FABRICS, LTD.] 545

PAGE

Winding up — Voluntary winding-up—Carrying on business of company —Priority of post-liquidation creditors over pre-liquidation creditors — Companies Act, 1929 (*c.* 23), *ss.* 191 (1) (*b*), 248 (1) (*b*) [*Re* GREAT EASTERN ELECTRIC CO., LTD.] 409

Compensation, compulsory purchase, local authority, assessment, disturbance of business 166, 480

——, injurious affection, ribbon development 252

COMPULSORY PURCHASE.

Local authority — Land acquired for housing — Assessment of compensation — Compensation for disturbance of business — Notice to treat — Variance in description of property — Separate notices to treat as to land and minerals — Award of one sum — Acquisition of Land (Assessment of Compensation) Act, 1919 (*c.* 57), *s.* 2 (2), (6) [HORN *v.* SUNDERLAND CORPORATION] 166, 480

Conditions, forfeiture, uncertainty, "marriage with a person who is not of Jewish parentage and of the Jewish faith" 539

CONTRACT.

Agreement for sale of goods — Price to be discharged "on hire-purchase terms"—Hire-purchase terms not settled by parties—Whether concluded agreement—Whether transaction sale of goods—Sale of Goods Act, 1893 (*c.* 71), *s.* 4 [G. SCAMMELL & NEPHEW, LTD. *v.* H. C. & J. G. OUSTON] 14

Frustration — Sale of goods — Delivery to named port — Named port becoming enemy-occupied territory — Trading with the Enemy Act, 1939 (*c.* 89), *s.* 1 (2) (*a*) (*i*) [FIBROSA SOCIETE ANONYME *v.* FAIRBAIRN LAWSON COMBE BARBOUR, LTD.] 464

Contract, breach, penalty or liquidated damages 507

——, c.i.f.. special clause varying common form clause 380

——, contract made before commencement of Courts (Emergency Powers) Act, 1939, building agreement followed by lease granted to company incorporated after commencement of Act 241

——, law governing, service of writ out of jurisdiction, contract governed by English law, express provision and further conflicting provision 158

——, maintenance, limited contract for maintenance of lift, liability of repairer to user of lift 525

Costs, profit costs, right to recover, town clerk also clerk to assessment committee 549

——, solicitor's lien, costs in divorce suit, common law lien on property or funds recovered, discretion of court 274

Counter-notice, time for, leave to enforce judgment or order 137

County court, proceedings transferred to High Court, notice of disclaimer of ground lease consequent upon war damage 29, 30

COUNTY COURTS.

Transfer of proceedings to High Court—Transfer to Chancery Division —Ex parte application not available —County Courts Act, 1934 (*c.* 53), *s.* 111 [PORTMAN *v.* ROSKILL & SONS] 226

Covenant, repairing covenant implied by statute, repair of sash-cord 153

Creditors, priority, post-liquidation creditors and pre-liquidation creditors 409

Custom, port, cargo sorted by port authority after discharge of ship, insurance of cargo, termination of risk 149

PAGE

Damage, by enemy action, notice of disclaimer, notice to avoid disclaimer, application by landlord for declaration that premises capable of beneficial occupation, no basis for application 502

——, ——, ——, rent payable in advance, notice of disclaimer followed by notice to avoid disclaimer, liability of tenant 449

——, ——, ——, "unfit" 454

Damages, action for personal injuries, loss of expectation of life, child aged 2½ years, amount of assessment 7

——, ——, overlapping Fatal Accidents Act and loss of expectation of life, .. 278

——, libel, judge sitting without jury, whether bound to award exemplary damages 297

——, liquidated, penalty or, breach of contract 507

Dangerous article, liability of repairer, life, limited contract of maintenance .. 525

Debentures, floating charge created within 6 months of winding up, not for benefit of company, validity 545

Decontrol, rent restriction, actual possession, step-daughter remaining in possession on death of tenant, break in tenancy 180

DESCENT AND DISTRIBUTION.

Felonious killing of deceased—Insanity—Onus of proof—Sufficiency of proof [*Re* POLLOCK, POLLOCK *v.* POLLOCK] 360

Disclaimer, notice, war damage, ground lease, transfer from county court to High Court 29, 30

DISCOVERY.

Objection to produce documents—Privilege—Production contrary to public interest—Practice of court—R.S.C., Ord. 31, *r.* 19 (*a*) (2) [DUNCAN *v.* CAMMELL LAIRD & CO., LTD.] 437

Dismissal, apprentice, conduct likely to lead to loss of time on part of other employees, breach of covenant in apprenticeship deed 552

Distribution, statutory exception from lapse, beneficiary dying before 1926, testatrix dying after 1925, distribution of interest saved from lapse 238

DIVORCE..

Adultery — Confession — By wife — Expected child result of adultery — No proof of non-access [FRAMPTON *v.* FRAMPTON AND BUSHELL] 305

Judicial separation — Grounds for presentation of petition—Desertion —Period of desertion required by statute—"Might have been presented"—Matrimonial Causes Act, 1937 (*c.* 57), *s.* 5 (1) [CHADBURN *v.* CHADBURN] 407

Summary jurisdiction — Report by probation officer—Necessity for observance of statutory provisions—Summary Procedure (Domestic Proceedings) Act, 1937 (*c.* 58), *ss.* 4, 5 [HIGGS *v.* HIGGS] 214

Divorce, costs, solicitor's, lien, common law lien on property or funds recovered, discretion of court 274

Documents, objection to produce, production contrary to public interest 437

Dog, trespasser injured by dog known to be dangerous, customer of public-house acting reasonably 515

Domicil, testator's, necessity to prove at date of death, family provision 236

EDUCATION.

Non-provided school — Repair — Liability — Managers — Public authority — Public Authorities Protection Act, 1893 (*c.* 61), *s.* 1—*Education Act*, 1921 (*c.* 51), *ss.* 29-35 [GRIFFITHS *v.* SMITH] 66

PAGE

EMERGENCY LEGISLATION.

Contract made before commencement of Act—Building agreement followed by lease—Lease made with company incorporated after commencement of Act—Building agreement made before commencement of Act with promoters of company—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2) [SMALLMAN *v.* EMBASSY CINEMA (TOTTENHAM COURT ROAD), LTD.] 241

——, *Judgment for stated sum—Refusal of relief against execution—Leave to appeal—Right to stay of execution—Courts (Emergency Powers) Act*, 1939 (*c.* 67) *s.* 1 (1) [METROPOLITAN REAL AND GENERAL PROPERTY TRUST, LTD. *v.* SLATERS AND BODEGA, LTD., REGAL PROPERTY TRUST, LTD. *v.* SLATERS AND BODEGA, LTD., FREEHOLD AND LEASEHOLD INVESTMENT CO., LTD. *v.* SLATERS AND BODEGA, LTD.] 310

Landlord and tenant — War damage — Notice of disclaimer — Notice to avoid disclaimer — Application by landlord for declaration that premises capable of beneficial occupation—No basis for application—Landand Tenant (War Damage) Act, 1939 (*c.* 72), *ss.* 6, 11 (1) (*c*) [COOPER *v.* JAX STORES, LTD.] 502

——, ——, ——, "*Unfit*" — *Landlord and Tenant (War Damage) Act*, 1939 (*c.* 72), *ss.* 1, 4, 6, 11, 24 [BOUDOU *v.* THORNTON-SMITH] .. 454

——, ——, ——, *Transfer of proceedings from county court to High Court—Ground lease—Order of court—County Courts Act*, 1934 (*c.* 53) *s.* 111—*Landlord and Tenant (War Damage) Act*, 1939 (*c.* 72), *ss.* 13, 23 [CLAVERING *v.* CONDUIT MEAD CO.] .. 30

——, ——, ——, ——, ——, ——. *Ex parte application—County Courts Act*, 1934 (*c.* 53), *s.* 111—*Landlord and Tenant (War Damage) Act*, 1939 (*c.* 72), *ss.* 13, 23 [METROPOLITAN LEATHER CO., LTD. *v* HERRMANN] 29

——, ——, *Rent payable in advance—Notice of disclaimer followed by notice to avoid disclaimer—Liability for rent after notice of disclaimer—Landlord and Tenant (War Damage) Act*, 1939 (*c.* 72), *s.* 11 [TURNER *v.* STELLA BOND, LTD.] .. 449

Leave to enforce judgment or order—Counter-notice—Time for—Courts (Emergency Powers) (Consolidation) Rules, 1940 (*S. R. & O.*, 1940, *No.* 408), *r.* 8 [FISHMONGERS' COMPANY *v.* DONINGTON FINANCE CO., LTD.] 137

Mortgage—Realisation of mortgage—Proceedings against property charged—Collateral security without personal covenant—No necessity for leave to proceed—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (4) [*Re* NATIONAL PROVINCIAL BANK, LTD.] 97

Trading with the enemy — Guarantee by English company of debt due to neutral by German company—Whether payment under guarantee for benefit or in relief of obligation of enemy—Trading with the Enemy Act, 1939 (*c.* 89), *s.* 1 (2) (*a*) [STOCKHOLMS ENSKILDA BANK AKTIEBOLAG *v.* SCHERING, LTD.] 257

Enemy, trading with, guarantee by English company of debt due to neutral by German company 257

PAGE

EVIDENCE.

Admissibility—Written statement by deceased person made while proceedings pending—Statement by plaintiff's employee—Party interested—Evidence Act, 1938 (*c.* 28), *s.* 1 [PLOMIEN FUEL ECONOMISER CO., LTD. *v.* NATIONAL MARKETING CO. 311

Execution, stay, right to, judgment for stated sum, refusal of relief under emergency legislation 310

EXECUTORS.

Legacies—Annuities to several persons free of tax—Rights of survivorship—Deferred annuities to infants—Valuation of annuities—Rate of income tax and allowances [*Re* TWISS, BARCLAYS BANK, LTD. *v.* PRATT] .. 93

Expectation of life, loss of, assessment of damages for personal injuries, child aged 2½ years, amount of assessment 7

EXTRADITION AND FUGITIVE OFFENDERS.

Arrest—Necessity for indorsed or provisional warrant—Fugitive Offenders Act, 1881 (*c.* 69), *s.* 2 [DIAMOND *v.* MINTER] 390

FACTORIES AND SHOPS

Factory — Technical institute carried on by local authority — Factories Act, 1939 (*c.* 67), *s.* 151 (9) [WESTON *v.* LONDON COUNTY COUNCIL] 555

Family provision, daughter, testator's domicil, necessity to prove at date of death 236

——, wife, provision made for children born out of wedlock and their mother, moral obligation 302

Fatal Accidents Act, overlapping of damages 278

Financing agreement, hire-purchase, sale by makers of machine to finance company, claim by hirer against makers for breach of implied warranty of fitness 269

Fire insurance, goods placed in grate for safety, fire lit forgetting goods there, whether ignition intentional 204

Football players, professional, proceeds of benefit matches, income tax 512

Forfeiture, condition, uncertainty, "marriage with a person who is not of Jewish parentage and of the Jewish faith" 539

Frustration, contract, sale of goods, delivery to named port, named port becoming enemy-occupied territory 464

Gift, gift during widowhood, beneficiary a spinster, gift for period which cannot exist.. 329

——, validity, religious purposes, gift to persons holding certain beliefs 405

Guarantee, English company guaranteeing debt due to neutral by German company, trading with the enemy .. 257

HIGHWAYS.

Nuisance — Fall of snow from building — Act of God [SLATER *v.* WORTHINGTON'S CASH STORES (1930), LTD.] 245

Highways, collision during blackout, duty of pedestrian to look behind 188

——, nuisance, butcher's shop, piece of fat escaping on to pavement 355

Hire purchase, agreement, financing, sale by makers of machine to finance company, claim by hirer against makers for breach of implied warranty of fitness 269

——, terms, price to be discharged on, agreement for acquisition of goods, whether concluded agreement 14

Housing, compulsory purchase order, local authority, assessment of compensation 166, 480

PAGE

HUSBAND AND WIFE.

Marriage — Annulment — Separation agreement entered into prior to annulment—Whether provision made for wife in agreement enforceable [ADAMS *v.* ADAMS] 334

Ignition, intentional, goods placed in grate for safety, fire lit forgetting goods there 204

Improvements, compliance with order under Housing Act, inclusion of subsidiary repairs in sum payable out of capital 143

Incapacity, partial incapacity treated as total incapacity, form of order 101

Income, capital or, annuity payments in hands of third party 111

——, ——, casual profits, damages, injury to land by improvements by river conservators, agreement apart from arbitration 104

INCOME TAX

Annuity payments — Contract to make annual payments in consideration of single premium—Aggregate of annual payments not to amount to less than amount of premium—Annuitant dying before receiving payments to amount of premium—Annuity payments continued to third person—Whether capital or income in hands of third person—Income Tax Act, 1918 (c. 40), Sched. D, Case III, r. 1 [SOTHERN-SMITH *v.* CLANCY] 111

Schedule E — Remuneration — —Voluntary payments — Professional football players — Proceeds of benefit matches or payments in lieu thereof [CORBETT *v.* DUFF, DALE *v.* DUFF, FEEBERY *v.* ABBOTT] 512

Income tax, deferred annuities to infants, valuation of annuities 93

Indemnity, stockbroker's right to indemnity, vendor repudiating contract 562

Industrial disease, silicosis, crushing bricks, breaking down furnace lining of silica bricks 1

Infants, annuities, deferred, valuation, rights of survivorship, rate of income tax and allowances 93

Injurious affection, ribbon development, compensation 252

Insanity, proof, sufficiency, felonious killing by beneficiary under will .. 360

INSURANCE.

Fire insurance — Unintentional ignition — Goods placed in grate for safety—Fire lit forgetting goods placed there [HARRIS *v.* POLAND] 204

Marine insurance — Insurance of cargo—Termination of risk—Custom of port—Cargo sorted by port authority after discharge from ship [G. H. RENTON & CO., LTD. *v.* BLACK SEA AND BALTIC GENERAL INSURANCE CO., LTD.] 149

——, *War risks — Collision with requisitioned ship—Requisitioned ship proceeding to be used as transport* [J. WHARTON (SHIPPING), LTD. *v.* MORTLEMAN] 175

Motor insurance — Proposal — Misrepresentation in proposal form—Action by insurance company for declaration—Right of third parties to strict proof of falsity of representations—Road Traffic Act, 1934 (c. 50), s. 10 [MERCHANTS' AND MANUFACTURERS' INSURANCE CO., LTD. *v.* HUNT] .. 123

Policy taken out by father on life of son—Powers exercisable on behalf of son—Father's interest to cease on son attaining 21 years—Policy held in trust for son [*Re* WEBB, BARCLAYS BANK, LTD. *v.* WEBB] 321

Insurers, policy giving insurers control of proceedings, all proceedings must be in name of insured, insurers not parties to action 231

PAGE

Judge, assessment of damages in libel action when sitting without jury, whether bound to award exemplary damages 297

Judicial separation, period of desertion necessary for decree 407

Jurisdiction, service of writ out of, contract governed by English law, express provision and further conflicting provision 158

Justices, report of probation officer, procedure 214

Justification, refusal to complete sale of property, commission 33

Land, local authority acquiring land for housing, assessment of compensation 166

——, settled, injury by improvements by river conservators, capital or income, casual profits, agreement apart from arbitration 104

LAND IMPROVEMENT

Expenditure payable out of capital—Alterations and improvements to enable buildings to be let—Alterations and improvements not necessarily structural—Settled Land Act, 1925 (c. 18), Sched. III, Part I, para. (xxiii) [*Re* LINDSAY'S SETTLEMENT (No. 2)] 143

——, *Improvements—Compliance with order under Housing Act — New drainage—Inclusion of subsidiary repairs in sum payable out of capital—Settled Land Act, 1925 (c. 18), s. 83, Sched. III, Part I, para* (xxi) [*Re* LINDSAY'S SETTLEMENT (No. 2)] 143

Landlord, covenant to repair implied from landlord's course of conduct, extent of statutory obligation to repair 153

——, damage to premises by enemy action, notice of disclaimer, notice to avoid disclaimer, application by landlord for declaration that premises capable of beneficial occupation, no basis for application 502

——, ——, ——, "unfit" 454

——, ——, rent payable in advance, liability of tenant 449

LANDLORD AND TENANT

Flats — Lift — Liability of landlord for proper repair of lift — Liability to visitor of tenants of flat [HASELDINE *v.* C. A. DAW & SON, LTD.] 525

Rent restriction — Decontrol — Actual possession by landlord—Stepdaughter remaining in possession on death of tenant—Break in tenancy—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 2 (1) [MOUSER *v.* MAJOR] 180

——, *Possession —Premises occupied in consequence of employment by former landlord—Occupation continued after death of former landlord under new agreement—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1), Sched. I (g) (i)* [READ *v.* GORDON] .. 222

Repairs — Statutory obligation—Extent of obligation—Covenant implied by course of conduct of landlord—Housing Act, 1936 (c. 51), s. 2 [SUMMERS *v.* SALFORD CORPORATION] .. 153

War damage — Notice of disclaimer — Ground lease — Order of court — Transfer of proceedings from county court to High Court—County Courts Act, 1934 (c. 53), s. 111—Landlord and Tenant (War Damage) Act, 1939 (c. 72), ss. 13, 23 [CLAVERING *v.* CONDUIT MEAD CO.] 30

——, ——, ——, ——, ——, *Ex parte application—County Courts Act, 1934 (c. 53), s. 111—Landlord and Tenant (War Damage) Act, 1939 (c. 72), ss. 13, 23* [METROPOLITAN LEATHER CO., LTD. *v.* HERRMANN].. 29

PAGE

——, ——, *Notice to avoid disclaimer—Application by landlord for declaration that premises capable of beneficial occupation—No basis for application—Landlord and Tenant (War Damage) Act,* 1939 (*c.* 72), *ss.* 6, 11 (1) (*c*) [Cooper *v.* Jax Stores, Ltd.] 502
——, ——, *"Unfit"—Landlord and Tenant (War Damage) Act,* 1939 (*c.* 72), *ss.* 1, 4, 6; 11, 24 [Boudou *v.* Thornton-Smith 454
——, *Rent payable in advance—Notice of disclaimer followed by notice to avoid disclaimer—Liability for rent after notice of disclaimer—Landlord and Tenant (War Damage) Act,* 1939 (*c.* 72) *s.* 11 [Turner *v.* Stella Bond, Ltd.] 449

Lapse, statutory exception from, beneficiary dying before 1926, testatrix dying after 1925, distribution of interest saved from lapse 238
Lease, grant of lease to nominees after outbreak of war, building agreement entered into before outbreak of war, relief under emergency powers 241
——, ground lease, war damage, notice of disclaimer, transfer from county court to High Court 29, 30
Leave, conditional leave to defend, condition not fulfilled within time specified, application to extend time 248
Legacies, annuities to several persons free of tax, rights of survivorship, deferred annuities to infants, valuation of annuities, rate of income tax and allowances 93

LIBEL AND SLANDER.

Damages—Assessment—Judge sitting without jury—Whether bound to award exemplary damages [Rook *v.* Fairrie] 297
Lien, solicitor's costs, common law lien on property or funds recovered, costs in divorce suit, discretion of court 274
Life assurance, father taking out policy on life of son, policy held in trust for son 321
Lift, landlord's liability for proper repair of lift in block of flats, liability to visitor of tenants of flat 525

LIMITATION OF ACTIONS.

Action on statute—Action based on Gaming Act, 1835 (*c.* 41), *s.* 2—*Action of specialty—Limitation Act,* 1939 (*c.* 21), *s.* 2 (3) [Brueton *v.* Woodward] 470
Amendment of statement of claim stating new clause of action—Action against public authority—Period of limitation extended after expiration of period allowed by earlier Act—Public Authorities Protection Act, 1893 (*c.* 61) *s.* 1—*Limitation Act,* 1939 (*c.* 21), *ss.* 21, 33 (*a*) [Batting *v.* London Passenger Transport Board] .. 228
Land—Tenancy agreement to let cottage and shed—Agreement terminated—Tenant quitting cottage but retaining possession of shed—No rent paid for 17 years—When right of action accrued—Limitation Act, 1939 (*c.* 21), *ss.* 4 (3), 9 (2) [Mason *v.* Warlow] 475

Local authority, land acquired for housing, assessment of compensation 166, 480
—— liability for accident to pupil of technical institute, factory 555
Maintenance, limited contract, lift, liability of repairer to user of lift .. 525
Marine insurance, insurance of cargo, termination of risk, custom of port, cargo sorted by port authority after discharge from ship 149
——, war risks, collision with requisitioned ship proceeding to be used as transport.. 175

PAGE

MASTER AND SERVANT

Apprenticeship—Dismissal of apprentice—Contract likely to lead to loss of time on part of other employees—Breach of covenant in apprenticeship deed—Apprentice a minor [Newell *v.* Gillingham Corporation] 552

MINES.

Coal mine—Statutory regulation—Breach of regulation by employee—Deliberate breach—Civil liability of mine-owners—"Reasonably practicable to avoid or prevent breach"—Coal Mines Act, 1911 (*c.* 20), *ss.* 29, 102 (1),(3), (8) [Yelland *v.* Powell Duffryn Associated Collieries, Ltd.] 278

MISTAKE.

Rectification—Evidence of mistake—Annuity granted without sufficient reference to deduction of tax—Grantor paying annuity in full for 30 years [Fredensen *v.* Rothschild] 430
Mortgage, realisation, proceedings against property charged, collateral security without personal covenant, no necessity for leave to proceed 97
Motor car, insurance, proposal, non-disclosure of material facts, strict proof of misrepresentation 123

NEGLIGENCE.

Damages—Personal injuries—Loss of expectation of life—Child aged 2½ years—Amount of assessment [Benham *v.* Gambling] 7
Dangerous article—Liability of repairer—Lift—Limited contract of maintenance—Liability to user of lift [Haseldine *v.* C. A. Daw & Son, Ltd.] 525
Highways—Collision during blackout—Duty of pedestrian to look behind—Bus using sidelights placed too high and no headlights—Bicycle not provided with red rear lamp [Franklin *v.* Bristol Tramways and Carriage Co., Ltd.] 188
Personal injuries—Damages under Fatal Accidents Acts—Overlapping of damages—Law Reform (Miscellaneous Provisions) Act, 1934 (*c.* 41), *s.* 1 (5) [Yelland *v.* Powell Duffryn Associated Collieries, Ltd.] .. 278
Notice, passenger ticket, conditions, notice obliterated by date stamp.. .. 172

NUISANCE.

Public nuisance—Premises adjoining highway—Danger arising from ordinary user—Butchers' shop—Piece of fat escaping on to pavement [Dollman *v.* A. & S. Hillman, Ltd.] 355
——, ——, *Fall of snow from roof—Act of God* [Slater *v.* Worthington's Cash Stores (1930), Ltd. 245
Nullity, separation agreement entered into prior to decree, whether provision made for wife enforceable 334
Overlapping of damages, Fatal Accidents Act and loss of expectation of life .. 278
Passengers, carriage of, passenger ticket, conditions, notice to passenger, notice obliterated by date stamp 172
Pedestrian, duty to look behind when walking on road during blackout.. .. 188
Police officer, arrest without warrant, fugitive offender 390
Possession, premises occupied in consequence of employment by former landlord, occupation continued after death of former landlord under ordinary tenancy agreement 222

PRACTICE.

Appeal—Ex parte order—Order made on insufficient disclosure of facts—Right to have order set aside irrespective of merits of case [Fishmongers' Company *v.* Donington Finance Co., Ltd.] 137

PAGE

Conditional leave to defend after judgment entered—Condition not fulfilled within time specified—Application to extend time—R.S.C., Ord. 64, r. 7 [MANLEY ESTATES, LTD. *v.* BENEDEK] 248

Running down action—Order for substituted service—Appeal by insurers in own name to have order set aside—Insurers no parties to action—Policy giving insurers control of proceedings [MURFIN *v.* ASHBRIDGE AND MARTIN] 231

Service out of the jurisdiction—Contract governed by English law—Express provision and further conflicting provision—R.S.C., Ord. 11, r. 1 (e) (iii) [OCEAN STEAMSHIP CO., LTD. *v.* QUEENSLAND STATE WHEAT BOARD] 158

Stay of action—Serving soldier—Usual order—R.S.C., Ord. 36, r. 10 [BELL *v.* WALKER] 307

Priority, post-liquidation creditors and pre-liquidation creditors 409

Privilege, documents, production contrary to public interest 437

PRIVY COUNCIL

Palestine — Damages — Breach of contract — Penalty or liquidated damages — Ottoman Code of Civil Procedure, arts. 111, 112 — Palestine Order in Council, 1932, s. 46 [MICHEL HABIB RAJI AYOUB *v.* SHEIKH SULEIMAN EL TAJI EL FAROUQI] 507

PRIZE LAW.

Ownership of goods—Exchange of goods immediately before hostilities—Public policy [THE GLENEARN] .. 371

Seizure of ship of enemy-occupied country—Claim against ship for salvage—Condemnation delayed—Rights of salvors [THE PRINS KNUD] 443

Probation officer, report, husband and wife case, necessity for observance of statutory provisions 214

Proof, onus, insanity, sufficiency of proof, felonious killing by beneficiary under will 360

Public authority, limitation of actions, negligence of public authority alleged, amendment of statement of claim rasing new case of negligence 228

——, ——, school managers 66

Public-house, customer acting reasonably, trespasser, injury by dog known to be dangerous 515

Public policy, prize law, exchange of goods immediately before hostilities .. 371

Rectification, evidence of mistake, annuity granted without sufficient reference to deduction of tax, annuity paid in full for 30 years 430

Redemption, workmen's compensation, payment continued for 6 months, amount of payment varied within 6 months period, whether redemption available 460

Regulation, statutory, coal mine, employee's deliberate breach of regulation, civil liability of mine-owners 278

Religious purposes, absolute discretion of trustee, " educational or charitable or religious purposes for Roman Catholics in the British Empire " 315

——, gift to persons holding certain beliefs, validity 405

Remuneration, voluntary payments, professional football players, proceeds of benefit matches 512

Rent, payable in advance, notice of disclaimer followed by notice to avoid disclaimer, liability of tenant 449

——, restriction, premises occupied in consequence of employment by former landlord, occupation continued after death of former landlord under new agreement 222

PAGE

Repairer, dangerous article, liability, lift, limited contract of maintenance, liability to user of lift 525

Repairs, non-provided school, liability of managers and committee 66

——, road, tramway operated by local authority, abandonment of tramway .. 383

——, statutory obligation, extent of obligation, covenant implied by course of conduct of landlord 143

Ribbon development, compensation, injurious affection 252

Road, repair, abandonment of tramway by local authority 383

——, restriction of ribbon development, compensation 252

SALE OF GOODS.

C.i.f. contract—Contract in common form—Special clause as to service of notices added—Compliance with special clause condition precedent [LUIS DE RIDDER, LTD. *v.* ANDRE & CIE. S.A., LAUSANNE] 380

——, *Delivery to named port—Right of vendor to insist on delivery at named port* [FIBROSA SOCIETE ANONYME *v.* FAIRBAIRN LAWSON COMBE BARBOUR, LTD.] 464

Hire-purchase agreement—Sale by makers of machine to finance company—Claim by hirer against makers for damages for breach of implied warranty of fitness—Sale of Goods Act, 1893 (c. 71), s. 14 (1) [DRURY *v.* VICTOR BUCKLAND, LTD.] 269

Sale of goods, agreement, price to be discharged " on hire-purchase terms," whether concluded agreement 14

Salvage, claim against ship, enforcement of claim in prize proceedings 443

School, non-provided, repair, liability of managers and committee 66

Separation, agreement, prior to nullity decree, whether enforceable 334

——, judicial, period of desertion necessary 407

Service, out of jurisdiction, action on contract, contract governed by English law, express provision and further conflicting provision 158

SETTLEMENTS.

Capital or income—Casual profits—Damages—Injury to land by improvements by river conservators—Agreement apart from arbitration [*Re* LINDSAY'S SETTLEMENT (NO. 1)] 104

Silicosis, industrial disease, crushing bricks, breaking down furnace lining of silica bricks 1

Snow, fall of snow from building, nuisance, act of God 245

Soldier, serving, stay of action, usual order 307

SOLICITORS.

Costs—Lien—Common law lien on property or funds recovered—Costs in divorce suit—Discretion of court [CAMPBELL *v.* CAMPBELL AND LEWIS] 274

Costs — Town clerk also clerk to assessment committee — Fees to be paid to corporation — Right to recover profit costs [R. *v.* BURNLEY RECORDER, *Ex parte* NEW EMPIRE (BURNLEY), LTD. (NO. 2)] 549

Specialty, action of, action based on Gaming Act, 1835 (*c.* 41), *s.* 2 470

Spinster, beneficiary, gift during widowhood, gift for period which cannot exist 5 329

Statute, action on, action based on Gaming Act, 1835 (*c.* 41), *s.* 2, action of specialty 470

Statutory duty, breach, trademark, imported goods, indication of place of origin, whether civil action available .. 364

Stay, action, serving soldier, usual order 307

——, execution, right to, judgment for stated sum, refusal of relief under emergency legislation 310

STOCK EXCHANGE.

Broker and client — Broker's right to indemnity — Vendor repudiating contract — Broker replacing stock — Sale effected on Bristol Stock Exchange — Interpretation of London Stock Exchange rules [HICHENS HARRISON WOOLSTEN & CO. *v.* JACKSON & SONS] .. 562

Street, repair, abandonment of tramway by local authority 383

Summary jurisdiction, report by probation officer, necessity for observance of statutory provisions 214

Technical institute, local authority carrying on, factory .. ..

Tenancy, agreement, tenant quitting cottage but retaining possession of shed, rent not paid for 17 years, limitation of actions 475

Tenant, damage to premises by enemy action, notice of disclaimer, notice to avoid disclaimer, application by landlord for declaration that premises capable of beneficial occupation, no basis for application 502

——, ——, ——, "unfit" 454

——, ——, rent payable in advance, notice of disclaimer followed by notice to avoid disclaimer, liability of tenant 449

Testator, domicil, necessity to prove at date of death, family provision 236

Third parties, rights, non-disclosure of material facts in motor car insurance proposal, strict proof of misrepresentation 123

Ticket, passenger, conditions, notice to passenger, notice obliterated by date stamp 172

Time, application to extend, conditional leave to defend after judgment entered, condition not fulfilled within time specified 248

——, counter-notice, leave to enforce judgment or order 137

TOWN AND COUNTRY PLANNING.

Development restricted by statute —Ribbon development—Compensation for injury to estate or interest—Assessment of compensation—Decrease in market value—Expense of release from onerous agreement—Restriction of Ribbon Development Act, 1935 (*c.* 47), *s.* 9 (1), (4) [GIBSON *v.* NORFOLK COUNTY COUNCIL] 252

Town clerk, clerk to assessment committee also, right to recover profit costs 549

TRADE AND TRADE UNIONS.

Settlement of trade differences and disputes—Reference to National Arbitration Tribunal—"Trade dispute" —"Workman"—Industrial Courts Act, 1919 (*c.* 69), *s.* 8—*Local Government Staffs (War Service) Act*, 1939 (*c.* 94)—*Defence (General) Regulations*, 1939 (*S.R. & O.*, 1940, *No.* 1217), *reg.* 58 AA—*Conditions of Employment and National Arbitration Order*, 1940 (*S.R. & O.*, 1940, *No.* 1305), *art.* 2 [R. *v.* NATIONAL ARBITRATION TRIBUNAL, *Ex parte* BOLTON CORPORATION] 413

TRADE MARKS.

Importation of goods bearing trade mark—Indication of place of origin—Breach of statutory duty—Whether civil action available—Plaintiffs importers of foreign goods only—Merchandise Marks Act, 1926 (*c.* 53), *s.* 1 [LONDON ARMOURY CO., LTD. *v.* EVER READY CO. (GREAT BRITAIN), LTD.] 364

Trading with the enemy, guarantee by English company of debt due to neutral by German company 257

TRAMWAYS.

Repair of road—Tramway operated by local authority—Tramway discontinued and lines filled in but rails not removed—Liability for repair of road as tramway authority—Tramways Act, 1870 (*c.* 78), *s.* 28 [BROWNE *v.* DE LUXE CAR SERVICES AND BIRKENHEAD CORPORATION.] 383

Transfer of proceedings, proceedings transferred from county court to Chancery Division of High Court, *ex parte* application not available 226

Trespasser, customer of public-house acting reasonably, dog known to be dangerous causing injury 515

Uncertainty, conditions, forfeiture, "marriage with a person who is not of Jewish parentage and of the Jewish faith" 539

Valuation, annuities, deferred annuities to infants, rights of survivorship, rate of income tax and allowances 93

War damage to property, notice of disclaimer, ground lease, transfer from county court to High Court 29, 30

——, ——, effect of legislation 449, 454, 502

War risks, marine insurance, collision with requisitioned ship proceeding to be used as transport 175

Warrant, arrest of fugitive offender, necessity for indorsed or provisional warrant 390

Warranty, breach, hirer from finance company claiming against makers .. 269

Widowhood, gift during, beneficiary a spinster, gift for period which cannot exist 329

Wife, confession of adultery, child expected as result of adultery, no proof of non-access 305

——, family provision, provision made for children born out of wedlock and their mother, moral obligation 302

——, separation agreement providing for, agreement entered into prior to annulment of marriage 334

WILLS.

Conditions—Forfeiture—Uncertainty—"Marriage with a person who is not of Jewish parentage and of the Jewish faith" [*Re* SAMUEL, JACOBS *v.* RAMSDEN] 539

Construction—Gift during widowhood—Beneficiary a spinster—Gift for period which cannot exist [*Re* GALE, GALE *v.* GALE] 329

——, *Residuary bequest—Gift to "charitable or benevolent object or objects"—"Or benevolent"—Validity* [*Re* DIPLOCK, WINTLE *v.* DIPLOCK] .. 193

Family provision — Testator's domicil—Necessity to prove at date of death—Inheritance (Family Provision) Act, 1938 (*c.* 45), *s.* 1 [*Re* WHITE, MASTAKA *v.* MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD., AND LAUDERDALE] 236

——, *Wife not provided for—Provision made for children born out of wedlock and their mother—Moral obligation—Inheritance (Family Provision) Act*, 1938 (*c.* 45) [*Re* JOSLIN, JOSLIN *v.* MURCH] 302

Lapse—Statutory exception from lapse—Beneficiary dying before 1926 —*Testatrix dying after* 1925—*Distribution of interest saved from lapse—Wills Act*, 1837 (*c.*26), *s.* 33 [*Re* HURD, STOTT *v.* STOTT] 238

Winding up, debentures, floating charge created within 6 months of winding up, not for benefit of company, validity 545

——, voluntary, business of company carried on, priority of post-liquidation creditors over pre-liquidation creditors 409

PAGE

WORKMEN'S COMPENSATION.

Incapacity—Partial incapacity treated as total incapacity—Form of order—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 9 (4)—*Workmen's Compensation Act*, 1931 (*c.* 18), *s.* 1 [DAN & STONE, LTD. *v.* LENNARD] .. 101

Industrial disease—False statement in writing by workman that he had not suffered from miner's nystagmus—Payment of compensation with notice that workman had previously suffered—Statutory agreement—Jurisdiction to make award in spite of misrepresentation—Workmen's Compensation Act, 1925 (*c.* 84), *ss.* 21, 23, 43 (1) (*b*) [PEASE AND PARTNERS, LTD. *v.* BIRCH] 343

——, *Silicosis—Crushing bricks—Breaking down furnace lining of silica bricks—Various Industries* (*Silicosis*) *Scheme*, 1931 (*S.R. & O.*, 1931, *No.* 342), *para.* 2 (viii) (*a*) [FORSTER *v.* LLANELLY STEEL CO. (1907), LTD.] 1

Redemption—Payment continued for 6 months—Amount of payment varied within 6-months period—Whether redemption available—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 13 [DAVIS *v.* CAMBRIAN WAGON WORKS, LTD.] 460

STATUTES, ETC., REFERRED TO

	PAGES
Gaming Act, 1835 (*c.* 41), *s.* 2	470
Wills Act, 1837 (*c.* 26), *s.* 33	238
Tramways Act, 1870 (*c.* 78), *s.* 28	383
Fugitive Offenders Act, 1881 (*c.* 69), *s.* 2	390
Public Authorities Protection Act, 1893 (*c.* 61), *s.* 1	66, 228
Sale of Goods Act, 1893 (*c.* 71), *s.* 4	14
——, *s.* 14 (1)	269
Coal Mines Act, 1911 (*c.* 20), *ss.* 29, 102 (1), (3), (8)	278
Income Tax Act, 1918 (*c.* 40), Sched. D, Case III, r. 1	111
Acquisition of Land (Assessment of Compensation) Act, 1919 (*c.* 57), *s.* 2 (2), (6)	166, 480
Industrial Courts Act, 1919 (*c.* 69), *s.* 8	413
Education Act, 1921 (*c.* 51), *ss.* 29-35	66
Rent and Mortgage Interest Restrictions Act, 1923 (*c.* 32), *s.* 2 (1)	180
Settled Land Act, 1925 (*c.* 18), *s.* 83	143
——, Sched. III, Part I, para. (xxi)	143
——, —, —, para. (xxiii)	143
Workmen's Compensation Act, 1925 (*c.* 84), *s.* 9 (4)	101
——, *s.* 13	460
——, *ss.* 21, 23, 43 (1) (*b*)	343
Merchandise Marks Act, 1926 (*c.* 53), *s.* 1	364
Companies Act, 1929 (*c.* 23), *s.* 266	545
——, *ss.* 191 (1) (*b*), 248 (1) (*b*)	409
Workmen's Compensation Act, 1931 (*c.* 18), *s.* 1	101
Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 3 (1), Sched. I (*g*) (i)	222
Law Reform (Miscellaneous Provisions) Act, 1934 (*c.* 41), *s.* 1 (5)	278
Road Traffic Act, 1934 (*c.* 50), *s.* 10 (3)	123
County Courts Act, 1934 (*c.* 53), *s.* 111	29, 30, 226
Restriction of Ribbon Development Act, 1935 (*c.* 47), *s.* 9 (1), (4)	252
Matrimonial Causes Act, 1937 (*c.* 57), *s.* 5 (1)	407
Summary Procedure (Domestic Proceedings) Act, 1937 (*c.* 58), *ss.* 4, 5	214
Factories Act, 1937 (*c.* 67), *s.* 151 (9)	555
Evidence Act, 1938 (*c.* 28), *s.* 1	311
Inheritance (Family Provision) Act, 1938 (*c.* 45)	302
——, *s.* 1	236
Limitation Act, 1939 (*c.* 21), *s.* 2 (3)	470
——, *ss.* 4 (3), 9 (2)	475
——, *ss.* 21, 33 (*a*)	228
Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (1)	310
——, *s.* 1 (2)	241
——, *s.* 1 (4)	97
Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *ss.* 1, 4	454
——, *s.* 6	454, 502
——, *s.* 11	449, 454
——, *s.* 11 (1) (*c*)	502
——, *ss.* 13, 23	29, 30
——, *s.* 24	454
Trading with the Enemy Act, 1939 (*c.* 89), *s.* 1 (2) (*a*)	257
——, *s.* 1 (2) (*a*) (*i*)	464
Local Government Staffs (War Service) Act, 1939 (*c.* 94)	413
Various Industries (Silicosis) Scheme, 1931 (S. R. & O., 1931, No. 342), *s.* 2 (viii) (*a*)	1
Courts (Emergency Powers) (Consolidation) Rules, 1940 (S. R. & O., 1940, No. 408), r. 8	137
Defence (General) Regulations, 1939 (S. R. & O., 1940, No. 1217), reg. 58AA	413
Conditions of Employment and National Arbitration Order, 1940 (S. R. & O., 1940, No. 1305), art. 2	413
R.S.C., Ord. 11, r. 1 (*e*) (iii)	158
——, Ord. 31, r. 19 (*a*) (2)	437
——, Ord. 36, r. 10	307
——, Ord. 64, r. 7	248
Ottoman Code of Civil Procedure, arts. 111, 112	507
Palestine Orde rin Council, 1932, *s.* 46	507

WORDS AND PHRASES

	PAGES
Educational or charitable or religious purposes for Roman Catholics in the British Empire	315
Marriage with a person who is not of Jewish parentage and of the Jewish faith	539
Trade dispute	413
Unfit	454
Workman	413

CORRIGENDA

[1940] Vol. 4, p. 516. O'MELIA v. FREIGHT CONVEYORS, LTD., AND OTHERS. Throughout this case the reference should be to reg. 20 of the Dock Regulations, 1934.

[1940] Vol. 4, p. 533. EAST SUFFOLK CATCHMENT BOARD *v.* KENT. The third line on this page should have been printed before the first line.

P. 325. *Re* WEBB, BARCLAYS BANK, LTD. *v.* WEBB. Counsel for plaintiff bank was *E. M. Winterbotham.*

P. 429. R. *v.* NATIONAL ARBITRATION TRIBUNAL, *Ex parte* BOLTON CORPORATION. Solicitors: *Dyson Bell & Co.*, were agents for *Philip S. Rennison*, Town Clerk, Bolton.

P. 464. In the title for FAIRBURN read FAIRBAIRN.

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THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

FORSTER *v.* LLANELLY STEEL CO. (1907), LTD.

[HOUSE OF LORDS (Viscount Simon, L.C., Viscount Maugham, Lord Thankerton, Lord Russell of Killowen and Lord Wright), **October 23, November 27, December 12, 1940**.]

Workmen's Compensation—Industrial disease—Silicosis—Crushing bricks—Breaking down furnace lining of silica bricks—Various Industries (Silicosis) Scheme, 1931 (*S.R. & O.,* 1931, *No.* 342), *para.* 2 (*viii*) (*a*).

The workman was engaged in breaking down the brick lining of furnaces. The bricks contained not less than 80 per cent. silica, and a certain amount of silica dust would result from the process of breaking them down. The workman contracted silicosis :—

HELD : the work in which the workman was engaged was crushing or grinding of bricks or other articles containing not less than 80 per cent. silica within the meaning of the Various Industries (Silicosis) Scheme, 1931, para. 2 (viii) (*a*). In order that the work being done may amount to a " process " within the meaning of that word in the scheme, it is not necessary that the effect produced shall be the direct object of the operation. An operation may amount to a " process " even though it is merely incidental to the main purpose which is being served.

Decision of the Court of Appeal ([1940] 1 All E.R. 235) *reversed.*

[**EDITORIAL NOTE.** The question here is purely one of the construction of the relevant portion of the scheme. The Court of Appeal decided that, since the scheme in certain places spoke of both " breaking " and " crushing," these words must describe different processes, and that the proper description of the man's work here in question was breaking. The House of Lords, in reversing this decision, have first emphasised that it is essential to give the proper meaning to the words of the scheme. They have then stated their opinion that, upon the facts as found by the county court judge, the man's work amounted to crushing, and not merely breaking the silica bricks. They emphasise that, that being the finding of the county court judge and there being evidence to support it, it is binding upon the higher courts.

AS TO SILICOSIS, see DIGEST, Vol. 34, pp. 464, 465, Nos. 3802-3811 ; and see WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 620-632].

APPEAL by the workman from a decision of the Court of Appeal (SLESSER, MACKINNON and GODDARD, L.JJ.), dated Dec. 18, 1939, and reported [1940] 1 All E.R. 235, where the facts are fully set out.

Gilbert J. Paull, K.C., and *S. R. Edgedale* for the appellant.
F. A. Sellers, K.C., and *G. Granville Sharp* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, the decision in this appeal depends upon the interpretation and application of a single word—the word "crushing." The appellant had been employed for more than 30 years by the respondent company, and he was certified by the appropriate medical board as being totally disabled from silicosis as from Mar. 29, 1939. The only controversy in the case from the beginning has been whether the appellant's work fell within any process included in the Various Industries (Silicosis) Scheme, 1931, made in accordance with the Workmen's Compensation Acts. By para. 2 (viii) of the scheme, the compensation provided applies to workmen employed in "the processes specified and those processes only" in the trades thereunder mentioned, and, in the case of works engaged in the manufacture of steel or in steel foundries, the specified processes are thus described in sub-para. (viii) (*a*):

> . . . crushing or grinding of silica rock, or any handling incidental to such crushing or grinding, or crushing or grinding of bricks or other articles containing not less than 80 per cent. total silica (SiO_2).

There is no dispute that the appellant was employed in works engaged in the manufacture of steel or in steel foundries, and the sole point of controversy is whether the process upon which he was engaged was that of "crushing" bricks. It is agreed that the bricks contained 80 per cent. of silica.

The county court judge, His Honour JUDGE FRANK DAVIES, in his judgment very clearly and accurately summarised the work which, according to the evidence, the appellant had been performing:

> He built and repaired smelting furnaces and ladles, and, while engaged on the former, handled bricks containing more than 80 per cent. of silica. These furnaces are exposed to very high degrees of heat, and need constant repair because the silica bricks of which they are built, in spite of their heat-resisting qualities, crumble under the fierce fires used to smelt the metals used in the works. The applicant had first to break down the old brick layers inside the furnaces and then build up new layers. The old layers, being cemented hard, require the use of crowbars to break them down, and the new bricks would often have to be chipped to shape them properly. Both processes, especially the former, involve the creation of large quantities of silica dust. The applicant, working in a confined space with little or no ventilation, had perforce to inhale the dust.

The county court judge came to the conclusion that the appellant was employed in the process of "crushing" these bricks. The Court of Appeal (SLESSER, MACKINNON and GODDARD, L.JJ.) felt themselves compelled to take a different view, largely on the ground that elsewhere in the scheme "breaking" was mentioned in addition to "crushing" and "grinding." Each Lord Justice in turn expressed his regret at having to reach such a conclusion, but did not consider that the work could be described as "crushing" bricks.

The Court of Appeal is, of course, perfectly right in insisting that, before a workman who contracts this dreadful disease can make good his claim for compensation from his employers under the scheme, it must be adequately shown that the work upon which he was engaged falls within the language which defines the liability. If the language does not cover the circumstances of the case, and if it is desirable to widen the scope of the scheme, that must be done by the making of a new scheme, or the enlargement of the existing scheme, by the Home Secretary under the Workmen's Compensation Act, 1925, s. 47. A Judges must be careful to give the scheme its proper application, in accordance with the due interpretation of its language, and not to succumb to the temptation of misconstruing language from a natural feeling that there might be much justice in including a case which is, on the proper construction, outside B the scheme. I have, however, come to the conclusion that the process upon which the appellant was engaged can justifiably be regarded as that of "crushing" bricks. The workman's evidence makes it plain that, in consequence of the intense heat to which these furnaces are exposed, the lining of silica bricks, mortared with silica clay, forms into a hard C mass which has to be broken down. The applicant explained how it was necessary, not only to cut down bricks by bar and mallet, but to use sledgehammers to break down the old lining. In these circumstances, it seems to me that the county court judge was well entitled to apply the dictionary meaning of "crush" as follows. He said:

> D There was no evidence that the words "crushing" or "grinding" have any technical trade meaning. They must, therefore, be given their ordinary meaning. In the Shorter Oxford English Dictionary to "crush" means "to compress with violence so as to destroy natural shape or condition; to bruise, bray, break down into small pieces; to comminute," etc. The work of the applicant exactly complies with this definition. He compressed the cemented bricks with violence so as to destroy their natural shape or condition. He broke them down into small E pieces, so small as to constitute particles of dust. He comminuted them.

In order that the work being done may amount to a "process" within the meaning of that word in the scheme, it is not necessary that the effect produced should be the direct object of the operation. An operation may amount to a "process," even though it is merely incidental to the F main purpose which is being served. I have by no means overlooked the argument derived from contrasting the phrase in subpara. (viii) (*a*) with phrases in subpara. (v) and subpara. (vii) of the scheme, but, though the presence of a larger variety of words in a list may, in some cases, help to give a more limited meaning to some of these words when they stand G alone, it must not be assumed that in all cases the application of one word excludes the possibility of the application of another to the same operation. To take another example from subpara. (vii), "handling" and "moving" would not seem to be mutually exclusive. Similarly, some crushing may be justly described as breaking and, conversely, some H breaking may amount to crushing. Certainly, crushing does not necessarily mean crushing to powder. The reduction of stone to the smaller size needed as road-metal might, I apprehend, be described as crushing the stone. I hold that the county court judge had facts before him upon which he could find that the appellant was employed in the process of "crushing" these bricks, and I therefore move that this appeal be allowed.

Viscount Maugham: My Lords, as my noble and learned friend Viscount Simon, L.C., has pointed out, the decision of this appeal depends upon the meaning and effect of the single word "crushing" in the context in which it is found—that is, in the Various Industries (Silicosis) Scheme, 1931, being a scheme made under the Workmen's Compensation Acts.

The facts have been sufficiently stated in the opinion to which I have referred, and the important part of para. 2 (viii) of the scheme has also been stated. The only question is whether the appellant, admittedly disabled by the disease of silicosis by reason of and in the course of his employment, had been employed in the process of crushing or grinding silica rock or bricks or other articles containing not less than 80 per cent. of total silica. It was proved by the evidence and found by the county court judge that the appellant, in the course of repairing smelting furnaces, had first to break down the old brick linings and then to build up new layers. The old brick linings contained more than 80 per cent. of silica. They were cemented, and, therefore, very hard. The appellant had to use, not only a crowbar, but also a sledgehammer, and this involved the creation of large quantities of silica dust, which the appellant, working in a confined space, had perforce to inhale.

My Lords, in my opinion, these facts sufficiently justified the county court judge in the conclusion that the appellant was employed in the process of "crushing" these bricks. Even if we take the view that the crowbar was employed in breaking or breaking down the bricks, it seems to me that the sledgehammer would inevitably crush the bricks or parts of bricks which adhered to the wall, and would crush large parts of the material into silica dust very dangerous to inhale. My Lords, for my part I do not feel the need of a dictionary on this occasion to lead me to the conclusion that what the appellant had to do involved the process of crushing bricks. The fact that what he did created "large quantities of silica dust" seems to me to establish that circumstance. No doubt he also was engaged in the process of "breaking" bricks, and, if he could have so used his crowbar that all the material came away in the form of broken bricks, I have no doubt he would have done so, for it would have saved both time and trouble. The judgment of the county court judge, however, seems conclusive to show that he also necessarily had to crush bricks into dust in order to clean the inside of each furnace.

This view of the case seems to me to avoid the necessity for dealing with the point of construction which found favour in the Court of Appeal, but I will add, with great respect for the Lords Justices, that, if the point is of importance—that is, if my way of approaching the matter is not correct—I accept the view of Viscount Simon, L.C., on the question of construction, and must agree with his conclusion. I concur, accordingly, with the proposed motion.

My Lords, my noble and learned friend Lord Thankerton, who is unable to be here to-day, requests me to say that he concurs in the proposed motion.

LORD RUSSELL OF KILLOWEN: My Lords, I would allow this appeal and restore the award of the arbitrator. That award was set aside in the Court of Appeal, mainly, if not entirely, on the ground that, since the scheme in certain parts of para. 2 refers to processes of " breaking, crushing, grinding, sieving, mixing or packing of silica rock " and "breaking, crushing or grinding of flint," but in para. 2 (viii) (*a*) refers only to crushing or grinding of bricks, a process of breaking bricks cannot be treated as a process within the meaning of that particular paragraph. They further held that the appellant was engaged in breaking bricks, and that the arbitrator erred in holding that the workman was engaged in crushing bricks. While I appreciate to the full the bearing of the fact that the word " breaking " does not occur in subpara. (viii) (*a*), I think that the Court of Appeal proceeded on wrong lines. The primary question for decision was one of fact, namely, was the workman engaged in a process of crushing bricks ? The arbitrator found as a fact that he was. His finding as to the work of the appellant runs thus :

> He compressed the cemented bricks with violence so as to destroy their natural shape or condition. He broke them down into small pieces, so small as to constitute particles of dust. He comminuted them.

There is evidence to justify that finding of fact. The Court of Appeal, I think, must have failed to appreciate to the full extent the difference between mere " breaking " of bricks and the crushing of the bricks which the arbitrator found resulted from the " breaking down " of the furnace linings. The fact of " crushing " having been found by the arbitrator upon sufficient evidence and without self-misdirection, the case falls, as a matter of construction, within subpara. (viii) (*a*) of the scheme.

LORD WRIGHT: My Lords, the appellant was certified by the medical board at Cardiff to be totally disabled from silicosis. There is no question that the disease was contracted by reason of and in the course of his employment, or that the respondents were responsible if the claim was otherwise good. The appellant claimed compensation under the Workmen's Compensation Act, 1931, s. 47, and under the Various Industries (Silicosis) Scheme, 1931. The particular provision of the scheme on which he based his claim was para. 2 (viii) (*a*), which applied to workmen employed (*inter alia*) in the trades of foundries and metal works and in the processes (*inter alia*) in such trades of the crushing or grinding of bricks or other articles containing not less than 80 per cent. total silica (SiO_2). The county court judge, who is very experienced in these matters, has made an award of compensation in favour of the appellant on the ground that he was engaged at all material times at the respondents' steel works at Llanelly in the process of crushing bricks containing 80 per cent. of silica, and thereby contracted the disease. The Court of Appeal have reversed this decision and set aside the award on the ground that the facts showed a case, not of crushing bricks, but only of breaking bricks, and hence that the appellant did not come within the scheme. I should be content simply to say that I agree completely with the careful and able judgment of His Honour JUDGE FRANK DAVIES, were it not that I am differing from the judgments of the Court of Appeal. I must accordingly state in brief my reasons for so doing.

In a case of this type there are two main questions. The first is what the words of the statute or statutory order mean. The second is whether the facts are such that the statute or order applies. The judge must deal with both questions. He must construe the words and then decide, according to his finding of the facts, whether the case falls within the words. It is not correct to describe the judge's conclusion as a finding of fact. The appellate court will be entitled and bound to set it aside if they hold that the judge has misconstrued the statute or order. If, however, he has not misconstrued the Act or order, his decision must stand, unless the appellate court are satisfied that, on a fair and reasonable view of the facts found by him, the case could not fall within the relevant words. The appellate court, however, are not entitled simply to substitute their judgment for that of the judge and to say what, in their judgment, the judge ought to have held. The issue is whether the judge could on any reasonable view, on the true construction of the statute, hold as he did.

The Court of Appeal in this case held that the process on which the man was engaged was not "crushing" bricks, but "breaking" bricks. They held that "breaking" and "crushing" are to be here strictly and sharply distinguished, because in other sections of the scheme the word "breaking" is used as a separate matter alongside "crushing." Thus we have in para. 2 (iv) "breaking, crushing, grinding, sieving, mixing or packing of silica rock," and in subpara. (vii) "breaking, crushing, or grinding of flint." These, however, are separate paragraphs dealing with different trades and processes from those dealt with in subpara. (viii), and cannot directly help in the construction of subpara. (viii). I could not attach weight to the fact that the word "breaking" is thus used in other places in the order. Apart from that, however, it is, I think, clear that "breaking" and "crushing" connote different processes. I disregard "grinding." That term is also clearly different, but it is not here material. The county court judge said that "crushing" is not used in the order with any technical trade meaning, and that it must receive its ordinary meaning. I do not question that, in the ordinary use of words, people distinguish "breaking" from "crushing." We all know the difference between a broken bone and a crushed bone. There is no need to multiply instances. Both words describe a disintegration of the particular object. The difference is in the degree to which the disintegration is carried. Wherever there are differences of degree, there must be cases where the one word becomes more applicable than the other, just as in the old problem of how many things constitute a heap. It is in a question of this type that the functions of a county court judge in compensation cases are peculiarly important. It would require a very clear case to induce me to differ from his conclusion that the man's work here involved crushing, and not merely the less thoroughgoing process of breaking. The judge has held (with abundant evidence) that the work of the applicant exactly complied with the definition of crushing which he accepted, and with which I agree :

> He compressed the cemented bricks with violence so as to destroy their natural shape or condition. He broke them down into small pieces so small as to constitute particles of dust.

I agree with the meaning which the judge attaches to the word "crushing." I cannot say that his application of the word to the facts is insensible, or such that the reasonable man, who is constantly invoked by the law, could not make it. I may add (if it were material, though I do not desire to intrude on the functions of the judge, and have not his experience in these matters) that I should arrive at the same conclusion myself. In my judgment, the appeal should be allowed and the order of the county court judge restored.

Appeal allowed.

Solicitors : *W. H. Thompson* (for the appellant) ; *Kenneth Brown, Baker, Baker*, agents for *Gee & Edwards*, Swansea (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Referred to. BISHOP *v.* CUNARD WHITE STAR, LTD. [1950] 2 All E.R. 22.

Referred to. HART *v.* GRIFFITHS-JONES. [1948] 2 All E.R. 729.

BENHAM *v.* GAMBLING.

[HOUSE OF LORDS (Viscount Simon, L.C., Viscount Maugham, Lord Russell of Killowen, Lord Wright, Lord Roche, Lord Romer and Lord Porter), **October 31, November 1, December 16, 1940.**]

Negligence—Damages—Personal injuries—Loss of expectation of life—Child aged two-and-a-half years—Amount of assessment.

A boy of the age of two-and-a-half years was killed in a road accident. The damages for loss of expectation of life were assessed at £1,200 :—

HELD : the proper assessment of such damages in this case, where the prospects of the boy were particularly favourable, was £200. The assessment of such damages is not to be made upon an actuarial basis. It is not the assessment of compensation for loss of years or for the loss of future pecuniary prospects, but it is the fixing upon commonsense principles of a reasonable figure for the loss of prospective happiness.

Decision of the Court of Appeal ([1940] 1 All E.R. 275) *reversed.*

[**EDITORIAL NOTE.** Since the decision in *Rose* v. *Ford* (2), one of the heads of damage in an action for personal injuries where the injuries have resulted in death has been a claim for loss of expectation of life. The assessment of such damages has been the subject of much discussion, but in general it has been based upon the fact that in *Rose* v. *Ford* (2) the House of Lords appeared to accept an assessment of £1,000 in the case of a young woman of 23 years of age. It is now clear that such was not the case. In *Rose* v. *Ford* (2), no question as to the correctness or otherwise of the figure at which the damages were assessed was before the House of Lords, and it is wrong to say that they accepted that figure. The House of Lords have now determined—and in this they confirm the opinions expressed by many judges in previous cases—that the assessment of damages in such a case is not to be based upon actuarial principles. The thing to be valued is, not a loss of years, but the loss of prospective happiness. The assessment of such a loss is described by Viscount Simon, L.C., as an attempt " to equate incommensurables." This, no doubt, sufficiently indicates the difficulty of such an assessment, and all that can be said is that the correct figure is one such as a jury might award in any particular case where they have been directed to award only a moderate sum. Much emphasis is laid upon the point that, in all cases, such damages must be moderate in amount. The position now is that, in the case of a young child, £200 is to be considered as the maximum figure. It is not clear whether, in the case of an adult, the figure is to be greater or less, but, as it is in all cases to be a moderate figure, it is clear that in such a case it should not greatly exceed £200.

As to Damages for Personal Injuries, see HALSBURY, Hailsham Edn., Vol. 23, pp. 724, 725, para. 1016 ; and for Cases, see DIGEST, Vol. 36, pp. 125, 126, Nos. 831-838.]

Cases referred to :

(1) *Flint* v. *Lovell*, [1935] 1 K.B. 354 ; Digest Supp. ; 104 L.J.K.B. 199 ; 152 L.T. 231.

(2) *Rose* v. *Ford*, [1937] A.C. 826 ; [1937] 3 All E.R. 359 ; Digest Supp. ; 106 L.J.K.B. 576 ; 157 L.T. 174.

(3) *Bailey* v. *Howard*, [1939] 1 K.B. 453 ; [1938] 4 All E.R. 827 ; Digest Supp. ; 108 L.J.K.B. 182 ; 160 L.T. 87.

Appeal by the defendant from a judgment of the Court of Appeal (Slesser, MacKinnon and Goddard, L.JJ.), dated Dec. 4, 1939, and reported [1940] 1 All E.R. 275, reducing to £350 a sum of £1,200 damages awarded for loss of expectation of life by Asquith, J., at the Winchester Assizes on July 21, 1939. The facts are fully set out in the opinion of Viscount Simon, L.C.

N. L. C. Macaskie, K.C., and *Humfrey H. Edmunds* for the appellant.

Cecil R. Havers, K.C., and *E. Gilbert Woodward* (for *Malcolm McGougan* on war service) for the respondent.

Viscount Simon, L.C. : My Lords, under the common law of England, it was the general rule that no executor or administrator could sue, or be sued, for any tort committed against or by the deceased in his lifetime. Such was the actual purport of the maxim *actio personalis moritur cum persona*, a maxim which is both obscure in origin and inaccurate in expression, for the proposition that personal actions abate with the death of either party is, of course, not true, generally speaking, of causes of action arising out of contract. The common law rule was subject to important exceptions, some of them admitted by the common law itself and others introduced by statute, but the rule itself was in effect swept away by the Law Reform (Miscellaneous Provisions) Act, 1934, which provides, subject to important exceptions, which do not, however, affect the present appeal, that, on the death of any person after the commencement of the Act, all causes of action vested in him shall survive for the benefit of his estate. Accordingly, if an individual is injured by accident due to the negligence of another person, the claim for damages no longer abates at his death, but survives for the benefit of his estate, and can be enforced in an action brought by his personal representative against the negligent defendant, or against the defendant's personal representative if the defendant has died, since the Act also provides for the survival of such a claim against the defendant's estate. This is so, of course, whatever may have been the cause of the plaintiff's death. However, for the purpose of solving the problem which this appeal presents, we have to consider more particularly the situation which results under the Act of 1934 if the injuries for which the defendant is responsible are so severe that the victim dies of them before action brought, or, at any rate, before judgment. In *Flint* v. *Lovell* (1), the Court of Appeal recognised the validity of a claim, made by a living person, for damages in respect of the prospective shortening of his own life due to the defendant's negligence. *Flint* v. *Lovell* (1) was approved by this House in *Rose* v. *Ford* (2). This latter case arose out of an accident which terminated fatally, after the commencement of the Law Reform (Miscellaneous Provisions) Act, 1934, and it followed that this element of damages, which is often described as "loss of expectation of life," could not be confined to the case where the injured person was alive at the date of the action, but must be equally admissible if the action is brought by his personal representative.

It has been recognised by judges who have had to deal with the many cases under this head which have fallen to be decided in the last few years that the measurement of this head of damage in terms of money is a very difficult matter, and the House has been furnished, with the assent of both parties to this appeal, with a list of cases already decided (some of them appearing in the reports and others available only in shorthand notes), which show how wide is the variation between the judgments of different tribunals of fact in assessing, in comparable circumstances, a suitable figure of loss under this head. None the less, it must be accepted that, in cases where the victim's life has been shortened by the accident and the claim is properly formulated and proved, some figure to represent the loss suffered by the deceased through the shortening of his life may be included in the damages, and several of the judges concerned have drawn attention to the need for authoritative guidance on the subject of how to arrive at it. In *Rose* v. *Ford* (2), the amount awarded on this head was £1,000 in respect of a young woman of 23, who was for the most part unconscious after the accident occurred, and who succummed to her injuries four days later, but in *Rose* v. *Ford* (2) no issue arose before your Lordships' House on the question of amount. The present appeal raises the problem of the assessment of damage for loss of expectation of life before this House for the first time, and it is, indeed, the only issue with which we are now concerned.

The action rose out of a motor car accident which occurred on June 1, 1938. The respondent is the father, and was constituted the administrator of the estate of an infant, who at the time of the accident was two-and-a-half years old. The appellant, in attempting to drive his car past another car in which this infant was one of the passengers, caused the latter car to overturn, and the infant was so severely injured that he died on the same day. At the trial before Asquith, J., sitting without a jury at Winchester Assizes, the negligence of the appellant was admitted, and the only question for the judge to decide was the amount of damages to be awarded to the administrator for the benefit of the child's estate. Since the child was unconscious from the moment of the accident till his death, there could be no claim for pain and suffering, and the only question, apart from funeral expenses, was that of damages arising from the diminution of the child's expectation of life. The child was a normal healthy child, living in a country village off the main road, where the risk of being exposed to road dangers and to certain diseases would be less than in a crowded centre. His father was in steady employment, and had reasonable prospects of continuing in it. The judge summed up his view of these facts by saying that the child was

> . . . living in modest but otherwise favourable circumstances in a village, the father having been in continuous employment for 15 years.

With the assent of counsel on both sides, Asquith, J., had before him the tables of expectation of life which are periodically prepared by the Registrar-General. According to these tables, a newly-born child has an expectation of life of about 58 years, a child of 10 of 55 years, and a young person of 20 of 46 years. For reasons which I shall state, I do not think that this statistical material is of assistance in such a case as the present, and, indeed, the judge correctly observed that the tables "are not real evidence in a matter of this kind." The judge was referred to a number of earlier decisions in which various amounts had been awarded, on no clearly defined principle, in respect of individuals of various ages, and observed that these decisions appeared to proceed on the basis :

> . . . that human life must be assumed on the whole to be an advantage rather than a disadvantage, and, if the victim has had its life reduced by a longer period, that is a graver disadvantage in respect of which larger damages ought to be awarded than if its life had been reduced by a shorter period.

As against this, the judge pointed out that some of the decisions implied :

> . . . that there are some factors which are assumed to operate the other way and which ought to be set off. In particular, there are some respects in which a young child, say, under 10, is more helpless and more liable to physical accident than an older child or an adult who can look after himself. Again, it seems to be hinted, not very clearly, in one or two cases, that the value to an infant of those years of its life when it is a very small infant is smaller than the value to it of the later years of its life and, seeing that the child, up to the age of 4 or 5 can hardly be said to have a coherent and continuous self-consciousness, it does seem to me that those early years are of less value to it than the later years would have been if it had lived to attain them.

The judge fixed the damages at the sum of £1,200, having arrived at the conclusion that this amount would, in the circumstances, "be neither unreasonably excessive nor unreasonably deficient."

The defendant appealed to the Court of Appeal. Slesser and MacKinnon, L.JJ, for somewhat different reasons, held that the award of

£1,200 should stand. GODDARD, L.J., thought that the appeal should be allowed and the amount reduced to £350. SLESSER, L.J., referred to and discussed a passage in the opinion of my noble and learned friend LORD WRIGHT in *Rose* v. *Ford* (2), at p. 849 ([1937] 3 All E.R., at p. 373) :

> I think both on principle and on authority this element of damage, that is, for the shortening of life or for the loss of the normal expectancy of life, was properly taken into calculation in *Flint* v. *Lovell* (1), and should be considered here, as GREER, L.J., thought. The jury should be directed that they are entitled to take it into consideration, along with other relevant elements of damage, using their common sense to give what is fair and moderate, in view of all the uncertainties and contingencies of human life. Special cases may occur, such as that of an infant or an imbecile or an incurable invalid or a person involved in hopeless difficulties. The judge or jury must do the best they can in the circumstances in this as in other cases.

He interpreted the reference by LORD WRIGHT to the infant (correctly, in my opinion) as meaning that, while, *ceteris paribus*, the injury inflicted by shortening life may be supposed to be greater in the case of youth than in the case of age, this simple test could not be applied without qualification when dealing with a young child. However, basing himself to a large extent on the award of £1,000 in the case of a child of 3 years of age in *Bailey* v. *Howard* (3), he took the view that the damages in the present case should not be disturbed or re-assessed. MACKINNON, L.J., in effect declared that he regarded the problem set as insoluble, and, therefore, found himself unable to affirm that the figure arrived at should be varied. He said, at p. 278 :

> The utmost at which I can arrive is that, if £1,000 was right in *Rose* v. *Ford* (2), the case of the girl of 19 or 20 years of age [she was really 23], then it looks as though £1,200 for this child of 2½ years of age is too much. However, I still find myself in the position of being compelled to say that I cannot say that £1,200 is too much, because I have no idea what the proper figure is.

Again, GODDARD, L.J., on the contrary, considered that the damages were extremely high, and, indeed, excessive. He pointed out the extreme difficulty of fixing a figure representing a *solatium* due to a person who is dead, and he construed the *dictum* in the opinion of LORD WRIGHT to which I have referred (the fact that the deceased is a very young child) as meaning, in the case of a dead infant [p. 280] :

> . . . that one should take that into account by way of minimising the damages. . . . With an infant, one does not know that its parents will live, or that it will have any education. It is far more exposed to certain dangers, and so forth, and it is altogether far more difficult with a baby of a few months, or even a few years, it seems to me, to come to a fair sum than is the case with another person. Certainly I should feel that in such a case any estimate based upon the probable length of life was entirely fallacious.

Then GODDARD, L.J., reached the conclusion that there is no principle upon which such damages can be assessed [p. 280] :

> . . . beyond the principle that one is to give what is fair and moderate and to use common sense.

He gave it as his opinion that £350 would be a reasonable sum in all the circumstances.

The House is now set the difficult task of indicating what are the main considerations to be borne in mind in assessing damages under this head, and, in the event of its differing from the view taken in the courts below,

of deciding whether this difference is of a kind which would justify interfering with the figure of £1,200 fixed by the judge. In the first place, I am of opinion that the right conclusion is not to be reached by applying what may be called the statistical or actuarial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at from a vast mass of vital statistics. The figure A
is not necessarily one which can be properly attributed to a given individual. In any case, the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life. The age of the individual may, in some cases, be a relevant factor—for example, in extreme old age the brevity of what life may be left may be relevant— B
but, as it seems to me, arithmetical calculations are to be avoided, if only for the reason that it is of no assistance to know how many years may have been lost unless one knows how to put a value on the years. It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for C
compensation, to be paid to the deceased's estate, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures—all that makes up "life's fitful fever"—have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even D
mainly, on the basis of the length of life which is lost. ASQUITH, J., appreciated this view, as his judgment shows, but I think that, in the light of the large amounts awarded in some previous cases in respect of quite young children, the figure he arrived at was unduly swollen by the consideration that the child might otherwise have had many years of E
life before it.

The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a court of law, F
but, in view of the earlier authorities, we must do our best to contribute to its solution. The judge observed that the earlier decisions quoted to him assumed "that human life is, on the whole, good." I would rather say that, before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the court to be G
satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency, that would be a circumstance justifying a H
smaller award. It is significant that, at any rate in one case of which we were informed, the jury refused to award any damages under this head at all. As LORD WRIGHT said in *Rose* v. *Ford* (2), special cases suggest themselves where the termination of a life of constant pain and suffering cannot be regarded as inflicting injury, or, at any rate, as

inflicting the same injury as in more normal cases. I would further lay it down that, in assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective, and the right sum to award depends on an objective estimate of A what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects.

B The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risks and C uncertainties of childhood, and having in some degree attained to an established character and to firmer hopes, his or her future becomes more definite, and the extent to which good fortune may probably attend him at any rate becomes less incalculable. I would add that, in the case of a child, as in the case of an adult, I see no reason why the D proper sum to be awarded should be greater because the social position or prospects of wordly possession are greater in one case than another. Lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status.

E It remains to observe, as GODDARD, L.J., pointed out, that, stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth, of course, is that, in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the F jury or judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead me to the conclusion that, in assessing damages under this head, whether in the case of a child or an adult, very moderate figure should be chosen. My noble G and learned friend LORD ROCHE was well advised when he pointed out in *Rose* v. *Ford* (2) the danger of this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award.

My Lords, I believe that we are all agreed in thinking that the proper H figure in this case would be £200, and that even this amount would be excessive if it were not that the circumstances of the infant were most favourable. In reaching this conclusion, we are in substance correcting the methods of estimating this head of loss, whether in the case of children or adults, which have grown up in a series of earlier cases, and which ASQUITH, J., naturally followed, and are approving a standard of measurement which, had it been applied in those cases, would have led, at any rate in many of them, to reduced awards. I trust that the views of this House, expressed in dealing with the present appeal, may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being meaured in coin of the realm with any approach to real accuracy.

My noble and learned friend Lord Romer, who is not able to be present to-day, authorises me to say that he agrees with this opinion.

Viscount Maugham: My Lords, I entirely agree.

Lord Russell of Killowen: My Lords, I also concur.

Lord Wright: My Lords, I also entirely agree.

Lord Roche: My Lords, I also concur.

Lord Porter: My Lords, I also agree.

Solicitors: *C. Howe Browne* (for the appellant); *Mackrell, Maton, Godlee & Quincey*, agents for *Talbot & Davies*, Andover (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

SCAMMELL *v.* OUSTON.

[House of Lords (Viscount Simon, L.C., Viscount Maugham, Lord Russell of Killowen and Lord Wright), **Oct**
December 16, 1940.]

Applied. British Electrical & Associated Industries *v.* Patley Pressings, Ltd. [1953] 1 All E.R. 94.

Contract—Agreement for sale of goods—Price to be discharged "on hire-purchase terms"—Hire-purchase terms not settled by parties—Whether concluded agreement—Whether transaction sale of goods—Sale of Goods Act, 1893 (*c.* 71), *s.* 4.

The respondents entered into negotiations with the appellants to acquire from the latter a motor lorry, giving an old lorry in part exchange therefor. The parties were agreed as to the new lorry to be supplied, its price and the rebate in respect of the old lorry, and, further, they were agreed that the balance of the purchase price was to be had on hire-purchase terms over a period of 2 years. The precise terms of the hire-purchase agreement, however, were not settled. The appellants subsequently repudiated the transaction, on the ground that there never was any concluded agreement at all between the parties, because the terms of the proposed hire-purchase agreement had not been settled:—

Held: there was no concluded agreement, since the expression "on hire-purchase terms" was too vague to be given any definite meaning.

Decision of the Court of Appeal ([1940] 1 All E.R. 59) *reversed.*

[**EDITORIAL NOTE.** It has often been said that the English courts, especially on the common law side, have in recent years been apt to give a wide interpretation to the terms used by business men in business documents, and have been inclined to find a binding contract where very indefinite expressions have been used. In the present case, their Lordships have decided that words which most business men would have thought sufficiently definite and conclusive are too vague to constitute a binding contract. Such a question is necessarily purely one of degree, but it is here of particular interest, as the words are now very commonly used. To the business man, the words " on hire-purchase terms " have a definite meaning, and he is little concerned with the exact arrangements for obtaining the necessary credit. In future, if there is to be a binding contract, the particular form of hire-purchase finance to be employed must be specified.

As to Essentials of Agreement, see HALSBURY, Hailsham Edn., Vol. 7, pp. 65, 66, para. 83 ; and for Cases, see DIGEST, Vol. 12, pp. 51-53, Nos. 277-298.]

Cases referred to :

(1) *Frost* v. *Knight* (1872), L.R. 7 Exch. 111 ; 12 Digest 340, *2841 ;* 41 L.J.Ex. 78 ; 26 L.T. 77.

(2) *Hillas & Co. Ltd.* v. *Arcos, Ltd.* (1932), 147 L.T. 503 ; Digest Supp.

(3) *Helby* v. *Matthews*, [1895] A.C. 471 ; 3 Digest 93, *245 ;* 64 L.J.Q.B. 465 ; 72 L.T. 841.

(4) *British & Benningtons* v. *North Western Cachar Tea Co., etc.*, [1923] A.C. 48 ; 12 Digest 355, *2958 ;* 92 L.J.K.B. 62 ; 128 L.T. 422.

(5) *May & Butcher, Ltd.* v. *R.*, [1934] 2 K.B. 17, n. ; Digest Supp. ; 103 L.J.K.B. 556, n. ; 151 L.T. 246, n.

(6) *Foley* v. *Classique Coaches, Ltd.*, [1934] 2 K.B. 1 ; Digest Supp. ; 103 L.J.K.B. 550 ; 151 L.T. 242.

(7) *McEntire* v. *Crossley Brothers*, [1895] A.C. 457 ; 39 Digest 483, *1033 ;* 64 L.J.P.C. 129 ; 72 L.T. 731.

Appeal by the defendants in the action from a judgment of the Court of Appeal (Slesser, MacKinnon and Goddard, L.JJ.), dated Dec. 7, 1939, and reported [1940] 1 All E.R. 59, affirming a judgment of Tucker, J., dated July 27, 1939. The facts are fully set out in the opinion of Lord Russell of Killowen.

A. T. Miller, K.C., and *Constantine Gallop* for the appellants.

Gilbert Beyfus, K.C., and *W. A. L. Raeburn* for the respondents.

Viscount Simon, L.C. : My Lords, during much of the argument I remained unconvinced that the result reached in the courts below, various as is the reasoning by which the different judges reached that result, could not be sustained by taking the view that this was a contract for the sale and purchase of a motor car, subject to the condition that the contract ceased to be binding if the finance for the purchase could not be provided for the respondents within a reasonable time, and in a reasonable manner, by the method of hire purchase through a third party. If this view of the bargain were justified, then the appellants wrongfully repudiated their prospective obligations out-and-out, without waiting to see whether the condition was or was not complied with. In that situation, the respondents could sue for damages for anticipatory breach without the necessity of the condition being fulfilled. *Frost* v. *Knight* (1), where the engagement to marry was conditional on the defendant's father first dying, and where the repudiation of the promise occurred in the father's lifetime, is a familiar example of the principle which I should have been glad to apply.

On further reflection, however, and in the light of the opinions prepared by some of your Lordships, which I have had the advantage of reading, I do not think this view is tenable. Apart from the objection that, if the contract is treated as a contract of sale in the terms suggested above, there is no signature by the appellants, as the party to be charged, accepting the condition, it appears to me that the crucial sentence, A "This order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of 2 years," is so vaguely expressed that it cannot, standing by itself, be given a definite meaning. That is to say, it requires further agreement to be reached between the parties before there would be a complete *consensus ad idem.* B If so, there was no contract, and, therefore, no breach. I move that the appeal be allowed.

VISCOUNT MAUGHAM: My Lords, I have had the advantage of reading the opinion of my noble and learned friend LORD RUSSELL OF C KILLOWEN. I entirely agree with it and with his statement of the relevant facts. No less, however, than 4 judges have come to a different conclusion, and they think that the respondents have succeeded in establishing a contract in this case.. I should always be slow to differ from views of those for whom I entertain a very genuine respect if I D could entertain any real doubt about the matter. I am constrained, therefore, to add some remarks of my own to explain why I am led to an opinion which coincides with that of my noble and learned friend LORD RUSSELL OF KILLOWEN.

It is a regrettable fact that there are few, if any, topics on which E there seems to be a greater difference of judicial opinion than those which relate to the question whether, as the result of informal letters or like documents, a binding contract has been arrived at. Many well-known instances are to be found in the books, the latest being that of *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (2). The reason for these different conclusions is that laymen F unassisted by persons with a legal training are not always accustomed to use words or phrases with a precise or definite meaning. In order to constitute a valid contract, the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that, unless this can be done, it would be impossible to hold G that the contracting parties had the same intention. In other words, the *consensus ad idem* would be a matter of mere conjecture. This general rule, however, applies somewhat differently in different cases. In commercial documents connected with dealings in a trade with which the parties are perfectly familiar, the court is very willing, if satisfied H that the parties thought that they made a binding contract, to imply terms, and, in particular, terms as to the method of carrying out the contract, which it would be impossible to supply in other kinds of contract: *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (2), at pp. 511, 512, 514.

My Lords, it is beyond dispute that, if an alleged contract is partly

verbal and partly in writing, it is necessary to take the whole of the negotiations into consideration for the purpose of seeing whether the parties are truly agreed on all material points, for, if they are not, there is no binding contract. Nor is it right to construe a letter or other document forming a part of the negotiations in such a case without regard to
A the verbal statements which also form a part of them. To construe the language of such a letter, so to speak, *in vacuo* might easily result in giving to the words, as used by the writer, a meaning which, in the circumstances of the case, he did not intend the words to bear, or one which the recipient of the letter did not attribute to them. Accordingly,
B the words in the letter, "This order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of 2 years," must be read together with the parol evidence of J. G. Ouston in order to give those words their true meaning. So read, I cannot myself doubt, they are not an attempt to impose a new condition, whether
C precedent or subsequent, but are merely a reminder of the common intention of the parties from the start, though perhaps—and even of that I am not certain—the reference to the period of two years was something which had not previously been agreed.

We come, then, to the question as to the effect of the so-called purchase
D being on "hire-purchase terms," and here we are confronted with a strange and confusing circumstance. The term "hire-purchase" for a good many years past has been understood to mean a contract of hire by the owner of a chattel conferring on the hirer an option to purchase on the performance of certain conditions: *Helby* v. *Matthews* (3). There
E is in these contracts—and this is, from a business standpoint, a most important matter—no agreement to buy within the Factors Act, 1889, or the Sale of Goods Act, 1893. There is only an option, and the hirer can confer on a purchaser from him no better title than he himself has, except in the case of sale in market overt. It is inaccurate and mis-
F leading to add to an order for goods, as if given by a purchaser, a clause that hire-purchase terms are to apply, without something to explain the apparent contradiction. Moreover, a hire-purchase agreement may assume many forms, and some of the variations in those forms are of the most important character—*e.g.*, those which relate to termination
G of the agreement, warranty of fitness, duties as to repair, interest, and so forth.

Bearing these facts in mind, what do the words "hire-purchase terms" mean in the present case? They may indicate that the hire-purchase agreement was to be granted by the appellants, or, on the other
H hand, by some finance company acting in collaboration with the appellants. They may contemplate that the appellants were to receive by instalments a sum of £168 spread over a period of 2 years upon delivering the new van and receiving the old car, or, on the other hand, that the appellants were to receive from a third party a lump sum of £168, and that the third party, presumably a finance company, was to receive

from the respondents a larger sum than £168, to include
interest and profit spread over a period of 2 years. Moreover, nothing is
said (except as to the 2-years' period) as to the terms of the
hire-purchase agreement—for instance, as to the interest payable, and
as to the rights of the letter, whoever he may be, in the event of default
by the respondents in payment of the instalments at the due dates. As A
regards the last matters, there was no evidence to suggest that there
are any well-known "usual terms" in such a contract, and I think that
it is common knowledge that in fact many letters, though by no means
all of them, insist on terms which the legislature regards as so unfair and
unconscionable that it was recently found necessary to deal with the B
matter in the Hire-Purchase Act, 1938. These, my Lords, are very serious
difficulties, and, when we find, as we do, in this curious case, that the
trial judge and the three Lords Justices, and even the two counsel who
addressed your Lordships for the respondents, were unable to agree upon
the true construction of the alleged agreement, it seems to me that it is C
impossible to conclude that a binding agreement has been established by
the respondents. I need not state the different views entertained by
the trial judge and the Lords Justices, and by counsel, for that will be
done by my noble and learned friend Lord Russell of Killowen.
The appeal must, I think, succeed, and the action for damages must be D
dismissed, with costs here and below.

Lord Russell of Killowen: My Lords, in my opinion, this
appeal should be allowed. The action is brought to recover damages
for breach of a contract alleged to have been made at certain interviews E
and by certain letters between the parties and their representatives.
In the forefront of their defence, the defendants pleaded that no agreement
arose out of those letters or interviews. That defence, if established,
is a complete answer to the action, and I feel no doubt that it has been
established. Although the argument before this House took place on F
4 separate days, the point which ultimately emerges is short, and depends
upon the question whether any, and what, certain meaning can be
attributed to one sentence in a letter from the plaintiffs to the defendants,
a question in the solution of which I get no help from any of the authorities
which were cited during the debate. G

The relevant facts can be briefly stated. The plaintiffs wished to
acquire a new motor van, giving in part exchange a Bedford van which
they owned. On Nov. 23, 1937, an interview took place between a
partner in the plaintiff firm, one John Ouston, and one Cook, who
represented the defendants, at which Cook recommended a Commer H
15-cwt. van as suitable for the plaintiffs' requirements, and suggested £80
as the figure at which the Bedford van should be taken in part exchange,
a figure, however, which Ouston considered too low. On the following
day, the defendants (by Cook) wrote to the plaintiffs a letter giving a
quotation for the proposed Commer van at £268 and stating that they

were prepared to allow the sum of £100 for the Bedford van. On Dec. 6, 1937, an interview took place at which John Ouston, his father and co-partner Harry Ouston, and Cook were present. At that interview, the offer contained in the letter of Nov. 24, 1937, was accepted by the plaintiffs. On Dec. 7, 1937, the defendants (by Cook) wrote to Ouston thanking him for the order placed with Cook on the previous evening, and asking him to let them have the official order in order to complete their records. This request was complied with by a letter from Harry Ouston, dated Dec. 8, 1937, in the following terms:

> We beg to acknowledge receipt of your acceptance of our order for:—One Commer 15-cwt. chassis complete with body as per your specification sent us on Nov. 25, No. 5263.
>
> This order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of 2 years.

It is upon the true meaning and effect of this last sentence that this case depends. However, before considering its meaning and effect, a further relevant fact must be added—namely, that throughout the negotiation between the parties it was made clear that the plaintiffs wanted to purchase on hire-purchase terms, and that there was never any question of an out-and-out purchase by the plaintiffs. Two questions and answers in John Ouston's evidence establish this beyond doubt:

> Anyway, this is quite clear, that from the beginning of your discussions with Mr. Cook you always told him quite definitely that you wanted to purchase on hire-purchase terms?—That is quite clear.
>
> There was no question of an out-and-out purchase?—No. There never was.

In these circumstances, the true construction of the agreement alleged by the statement of claim to arise out of the letters of Dec. 7, 1937, and Dec. 8, 1937, and the interview of Dec. 6, 1937, is a matter open to endless doubt and speculation. At least five different versions have been presented for your Lordships' consideration.

The trial judge was of opinion that there existed a contract for the sale by the defendants to the plaintiffs of a Commer van for the sum of £268, to be paid and satisfied as to £168 in cash and as to the balance by the delivery to the defendants of the Bedford van, that the concluding sentence of the letter of Dec. 8, 1937, "was merely a condition precedent to the contract becoming an effective contract," and that, as in his opinion, the defendants

> . . . repudiated the contract on wrong grounds, they cannot rely on the necessity for the plaintiffs showing that that condition had been fulfilled.

The Court of Appeal took a different view. The Lords Justices all treated the sentence in question as a term of the contract between the plaintiffs and defendants, and not as a condition precedent to that contract, but they differed *inter se* as to the construction of that contract. Slesser, L.J., thought that the alleged contract might be carried out in any one of several specified ways, but that it lay on the plaintiffs within a reasonable time, in a reasonable way, to produce some method whereby they could, under the conditions of a hire-purchase agreement, satisfy their undertaking by one way or another through a hire-purchase agreement to pay the defendants. Notwithstanding this lack of certainty, Slesser, L.J., considered that a complete agreement had been concluded, on the ground that, as he put it, at p. 64:

> You may very well agree that a certain part of the contract, such as the particular conditions on which the hire-purchase agreement was to be made, was to be settled in conjunction with a third party.

Then MacKinnon, L.J., took the view that by the alleged contract the defendants undertook to procure a finance company to purchase the van from them, and to hand over its possession to the plaintiffs under the terms of a hire-purchase agreement pursuant to which the plaintiffs would ultimately pay to the finance company £268, reduced to £168 by the £100 for the Bedford van, which sum would be paid to the finance company by the defendants. Goddard, L.J., was of opinion that the alleged contract was a contract by the defendants to put the plaintiffs in possession of the Commer van for a sum of £268, £100 of which was to be satisfied by the delivery of the Bedford van and £168 of which was to be satisfied by instalments over 2 years, being 24 monthly instalments, and that it was a matter for the choice of the defendants how the hire-purchase term of the alleged contract was to be carried out.

At your Lordships' bar, leading counsel for the plaintiffs (agreeing in substance with the trial judge) argued that there was a simple contract of sale and purchase, subject only to the condition precedent that the balance of the purchase price could be had on reasonable hire-purchase terms. On the other hand, junior counsel contended for a contract which was not a contract of sale and purchase at all, but a contract the obligations under which he stated in elaborate detail, the whole being subject to a condition subsequent defined in negative form by reference to the concluding sentence of the letter of Dec. 8, 1937. The existence of this fivefold choice is embarrassing but eloquent. An alleged contract which appeals for its meaning to so many skilled minds in so many different ways is undoubtedly open to suspicion. For myself, I feel no doubt that no contract between the parties existed at all, notwithstanding that they may have thought otherwise.

The oral evidence establishes that the only acquisition by the plaintiffs which was contemplated by the parties was an acquisition by some form of hire purchase which would enable the plaintiffs to spread their payment of £168 over a period of time. This could be brought about in various ways, and by documents containing a multiplicity of different terms. In my opinion, the concluding sentence of the letter of Dec. 8, 1937, was not a condition precedent to any contract. It is merely a recording in writing of what had been the common intention of the parties in their discussions and negotiations, with a stipulation, apparently for the first time, for a period of 2 years. However, in view of the numerous forms of hire-purchase transactions, and the multiplicity of terms and details which they involve, the plaintiffs are faced with what appears to me to be a fatal alternative,—namely, either (i) this term of the alleged contract is quite uncertain as to its meaning, and prevents the existence of an enforceable contract, or (ii) the term leaves essential contractual provisions for further negotiation between the parties, with the same result. Accordingly, in my opinion, the action for damages for breach of an alleged contract should have been dismissed, and this appeal should succeed.

LORD WRIGHT: My Lords, the decision of this appeal depends on the answer to the question whether there was a concluded contract between the appellants and the respondents. The respondents were plaintiffs in the action, and claimed damages from the appellants for breach of contract. The appellants, who had raised other objections, limited their defence in this House to the one issue, "contract or no contract." TUCKER, J., the trial judge, and the Lords Justices in the Court of Appeal have decided against the appellants, but for reasons which present an embarrassing diversity.

In Nov., 1937, the respondents were desirous of acquiring a new motor van for their business of house furnishers. As a result of interviews between their partners and one Cook, general sales manager of the appellants, the appellants on Nov. 24, 1937, sent to the respondents a quotation of £268 for a Commer 15-cwt. chassis complete as per manufacturer's specification, fitted with special Scammell body constructed in the appellants' shops. Against the £268 they were prepared to allow the respondents £100 for their 1935 2-ton Bedford Luton van. A specification of the body was enclosed. At a conversation between Cook and H. C. Ouston, the latter placed the order with the appellants. This was confirmed by letter of Dec. 7, 1937, which stated that the appellants could deliver the van before Feb., 1938, and asked to have the respondents' official order. On Dec. 8, 1937, the respondents replied in the following terms:

> We beg to acknowledge receipt of your acceptance of our order for one Commer 15-cwt. chassis complete with body as per your specification sent us on Nov. 25, No. 5263. This order is given on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of 2 years.

At the oral conversations, the respondents had clearly insisted that a hire-purchase agreement was essential. No terms, however, of such an agreement had been settled, nor, indeed, had it been discussed with whom the agreement would be made. H. C. Ouston, when asked in cross-examination, "The hire-purchase agreement, of course, you did not expect, I suppose, to be with Messrs. Scammells, did you?" replied:

> I knew very well it would not have been. To the best of my knowledge, anyhow, I thought it would be, as it turned out to be, with United Dominions.

J. G. Ouston said in evidence that he always told Cook quite definitely that they wanted to purchase on hire-purchase terms, and that there never was any question of an out-and-out purchase. The appellants were obviously content that the deal should be on a hire-purchase basis, and proceeded with the completion of the van. On Jan. 27, 1938, they wrote to the respondents that they had received advice from the United Dominions Trust Co., Ltd., of their acceptance of hire purchase in connection with the vehicle and would forward the documents in due course. On Feb. 10, 1938, they reported that the van would be ready for collection in a few days, "subject to mutual acceptance of the hire-purchase agreement." They added:

> We make it a condition of the supply of vehicles on hire-purchase terms that we approve terms of agreement before supply.

The next development was an inspection of the Bedford van by the appellants, which resulted in an unfavourable report on its condition, and also a report that it was a 1934 vehicle and not a 1935 vehicle. The appellants then wrote on Feb. 14, 1938, that, as the vehicle did not fulfil the contract conditions, the respondents had better dispose of it locally. They added:

> We assume that the hire-purchase company will require a minimum of 25 per cent. deposit, which would call for £67.

The respondents' solicitors wrote denying that the complaints alleged against the van were justified, and in their turn charged the appellants with default in not delivering the Commer van in time. They also threatened proceedings. The appellants replied reiterating their objections, and added that, if the respondents would deliver a 1935 Bedford van in approved condition, they would accept it. Otherwise, they asked that the respondents would complete the transaction, take delivery of the new machine, and pay the sum of £268 for it. They added that hire-purchase terms could no doubt be arranged to suit the convenience of the respondents, but that, of course, did not affect the business. On Feb. 26, 1938, the appellants wrote to the respondents in the following terms:

> In order to assist you in placing with the hire-purchase company your new Commer lorry which we have ready to your order, we are attaching hereto a list showing the complete cost of the vehicle.

This, with extras, came to £298 6*s*. 2*d*. The correspondence proceeded until, on May 18, 1938, the respondents issued their writ against the appellants claiming damages for breach of contract to supply a Commer 15-cwt. chassis complete with body and accept a 2-ton Bedford Luton van in part exchange therefor. This was repeated in the statement of claim, which added that the price was £268. The defence denied that there was any contract, by para. 2 pleaded that, by the express terms of the letter of Dec. 8, 1937, the alleged agreement was subject to a condition as to hire-purchase terms as therein set out, and claimed that:

> . . .accordingly unless and until a hire-purchase agreement in terms mutually approved by the plaintiffs and the defendants was effected neither party was bound. No such hire-purchase agreement was ever effected.

It was also pleaded that the condition was too vague to be capable of any effect in law, and that, therefore, the agreement was void for uncertainty. The defence further relied on the Sale of Goods Act, 1893, s. 4, and set up that the complaint in regard to the condition and age of the Bedford van constituted breaches of condition excusing the appellants from performance. These latter defences were abandoned before the judge, and need not be further considered. There was also a counterclaim not now material.

At the trial, TUCKER, J., found that the appellants' letter of Feb. 14, 1938, was a complete repudiation of any contract, and awarded damages in favour of the respondents against the appellants for breach of contract, having decided against their contention that there was no contract. He said that counsel for the respondents had argued that the contract was that the respondents should provide £168 for the balance of the price, and that it was immaterial to the appellants where the respondents got the money from and what arrangements they made with the finance company. He further stated that counsel for the respondents had also argued that the stipulation as to hire purchase was merely a condition precedent to the contract becoming an effective contract. The judge held that counsel for the respondents was right in his argument, by which I think he meant the second of these arguments, and held that the appellants by wrongly repudiating the contract had relieved the respondents from showing that the condition precedent had taken effect or that the purchase price on hire-purchase terms over a period of years had in fact been obtained, or could have been obtained. He held that the Sale of Goods Act, 1893, s. 4, had been complied with.

In the Court of Appeal, SLESSER, L.J., affirmed the judgment. The ground on which he held that there was a concluded agreement was that, though there were many methods of hire-purchase finance which might be adopted, what was meant was, in his opinion, that the purchasers must in a reasonable time, in a reasonable way, satisfying the words "hire-purchase agreement," produce some method whereby they could satisfy their undertaking by one way or another through a hire-purchase agreement to pay the sellers. The particular conditions under which the hire-purchase agreement was to be made were, he said, to be settled in conjunction with a third party. Like TUCKER, J., he placed the obligation to procure the hire-purchase agreement on the respondents, but held that the repudiation by the appellants relieved the respondents from showing fulfilment of the condition. MACKINNON, L.J., on the other hand, placed the obligation as regards the hire-purchase agreement on the appellants. In his opinion, the parties knew perfectly well the sort of agreement with the finance company which both contemplated. He said, at p. 66:

> It is quite true that the form of that agreement might have been in one or other of two or three forms. The essential stipulation implied was that it should be in a reasonable form. Either one of two variant forms, if in a reasonable form, would have sufficed for the satisfaction of the defendants' obligation.

He held that it was not a contract for the sale of goods but a contract to procure the finance company to purchase for the defendants a car and let it on hire-purchase terms to the plaintiffs. He found among the papers the draft of an agreement which he regarded as carrying out the transaction. It was, however, not of that type at all. The appellants were, according to that draft, to be the letters and the respondents the hirers. The United Dominions Trust Co., Ltd., were to finance the transaction by discounting 24 promissory notes made by the respondents payable to the appellants and by them to be indorsed to the trust company for a total sum of £194, representing the balance of the purchase price of £168, with bank charges added. The draft hiring agreement itself contained 11 clauses, dealing with the hirers' obligation to repair and to insure, giving the letters a right of retaking the van in the event of the hirers' default, and finally giving the hirers, when all payments were discharged and terms fulfilled, the option to purchase the van for 1*s*. The draft agreement, to which the appellants, the respondents and the trust company were to be parties, was never signed. It was not in evidence, and, with great respect, I do not think that MacKinnon, L.J., was entitled to refer to it. However, I have thought it necessary to look at it in order to understand the opinion of MacKinnon, L.J. If such an agreement was necessary to complete the bargain involved in the letter of Dec. 8, 1937, it clearly, in my opinion, could not have been arrived at until the parties had settled many doubtful points on which they might have differed, and as to which the court would not be able or entitled to say what was reasonable as between them. Goddard, L.J., seems to agree with MacKinnon, L.J., that it was for the appellants to procure the agreement with the finance company, but he agreed only in that respect. They were, it seems, in his opinion, to submit to the respondents a hire-purchase agreement which gave the respondents 2 years' credit for the £168. He said, at p. 67 :

> It seems to me that it is a matter of entire indifference to the plaintiffs whether the defendants procured a finance company to buy direct from them and let to the plaintiffs or whether the defendants procured a finance company to discount bills given under a contract by which the defendants themselves entered into direct relations with the plaintiffs. Those are matters which the defendants could choose for themselves. The plaintiffs, however, would have to take the vehicle, and have to enter into the agreement, provided an agreement was submitted to them which gave them 2 years' credit for the £168.

As to matters like rate of interest and bank charges, terms of hiring and other essentials affecting the respondents' obligations and rights, the respondents, if I understand the view of Goddard, L.J., would have no say at all.

To complete a statement of the variant readings submitted for your Lordships to choose the one which may seem to represent the true meaning of the parties, it is necessary very briefly to summarise the contentions of Mr. Beyfus and his junior Mr. Raeburn before this House. The former put his contentions in the alternative. First he argued that the phrase in the letter of Dec. 8, 1937, meant that the bargain was subject to a condition precedent that a certain state of affairs for the benefit of the respondents should exist between the date of the contract and the date of delivery of the vehicle—namely, the availability of a fund on hire-purchase terms—and that, the appellants having repudiated the contract, the respondents were absolved from proving that the condition had been fulfilled. He meant, I think, by the condition precedent a stipulation in the contract, and not an extrinsic condition without the fulfilment of which there could be no contract. His alternative submission was based on the view that " can " was equivalent to " shall." On this alternative, he read the term as meaning that the appellants were either personally to enter into a hire-purchase agreement or procure another person to enter into a hire-purchase agreement over a period of two years, containing reasonable terms having regard to the usual practice of hire-purchase finance. The personality of the hirer, he said, was left to the option of the appellants. He further submitted that, if the courts could not give a defined meaning to the condition, they should disregard it. Mr. Raeburn argued that the agreement was defeasible if the respondents could not obtain suitable financial assistance on hire-purchase terms, subject, however, to this, that the appellants could compel the respondents to take delivery if they could show the availability of hire-purchase finance. Thus, he contended, the agreement was binding unless it was shown that reasonable businesslike hire-purchase facilities were not available. All that " hire-purchase " here meant, he contended, was a system under which the vehicle was hired with an option to purchase. Agreement between the parties as to terms was immaterial.

Such are the conflicting views which are placed before your Lordships as requiring a decision in favour of the respondents. In my opinion, however, the correct view is that put forward by counsel for the appellants —namely, that there never was a concluded contract between the parties. It is true that, when the appellants broke off the affair, they gave reasons for doing so which they could not justify, but, when they were sued for breach of contract, they were entitled to resist the claim on any good ground which was available, regardless of reasons which they had previously given. As LORD SUMNER pointed out in *British & Benningtons* v. *North Western Cachar Tea Co., etc.* (4), at p. 71, if a party repudiated a contract giving no reasons at all, all reasons and all defences in the action, partial or complete, would be open to him. Equally would this be so, I think, if he gave reasons which he could not substantiate. If there never was a contract, they could not be made liable for breach of contract. There are, in my opinion, two grounds on which the court ought to hold that there never was a contract. The first is that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention. The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance, and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity, so long as any definite meaning can be extracted. The test of intention, however, is to be found in the words used. If these words,

considered however broadly and technically, and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found, but I think that it is found in this case. My reason for so thinking is not only based on the actual vagueness and unintelligibility of the words used, but is confirmed by A
the startling diversity of explanations, tendered by those who think there was a bargain, of what the bargain was. I do not think it would be right to hold the appellants to any particular version. It was all left too vague. There are many cases in the books of what are called illusory contracts—that is, where the parties may have thought they were making a contract, B
but failed to arrive at a definite bargain. It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by C
each party are reasonably certain. In my opinion, that requirement was not satisfied in this case.

However, I think that the other reason, which is that the parties never in intention, nor even in appearance, reached an agreement, is a still sounder reason against enforcing the claim. In truth, in my opinion, D
their agreement was inchoate, and never got beyond negotiations. They did, indeed, accept the position that there should be some form of hire-purchase agreement, but they never went on to complete their agreement by settling between them what the terms of the hire-purchase agreement were to be. The furthest point they reached was an understanding or E
agreement to agree upon hire-purchase terms. However, as LORD DUNEDIN said in *May & Butcher, Ltd.* v. *R.* (5) (reported in a note to *Foley* v. *Classique Coaches, Ltd.* (6)), at p. 21 :

> To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something F
> which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties.

In this case, MACKINNON, L.J., thought that the agreement of the parties was complete and nothing was left for them to agree. Whatever was lacking in their agreement could and should, he thought, be supplied G
by the court by invoking the standard of reasonableness, on the principles laid down by this House in *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (2). The view of MACKINNON, L.J., as I have already indicated, was, if I have understood correctly, that there was a contract for a hire-purchase agreement, and that no further agreement of the parties was necessary, H
because the court could determine for the parties what was a reasonable hire-purchase agreement, and thus the contract would be complete. I am unable to concur in this conclusion. In the first place, the appellants, at least in their letter of Feb. 10, 1938, expressly stated that the transaction was subject to mutual acceptance of the hire-purchase agreement,

This was not demurred to by the respondents. The letter was written before any difficulty had arisen about the condition or description of the Bedford van. It seems to me that this attitude was sensible both from the point of view of business and of law. It is here necessary to remember what a hire-purchase agreement is. It is not a contract of sale, but of
A bailment. The owner of the chattel lets it out on hire for a periodic rent on the terms that, on completion of the agreed number of payments, and on due compliance with the various terms of the agreement, the hirer is to have the option to buy the chattel on payment of 1*s.* or some nominal sum. The condition that the hirer is not to become owner automatically
B on completion of the agreed payments, but merely has an option to purchase, was adopted to avoid difficulties under the Factors Act or the Bills of Sale Act, as explained by this House in *Helby* v. *Matthews* (3) and *McEntire* v. *Crossley Brothers* (7). While the bailment continues, the property remains in the letter. Such a transaction, though not a
C contract of sale, is used in practice to carry out a sale transaction, with the advantage to the buyer of credit facilities. Though the property in the chattel does not pass while the agreement is current, the hirer gets the use of it. What would be the price if it were a contract of sale has to be increased by whatever sum is necessary for interest and bank
D charges until the periodic instalments have been discharged. Terms must accordingly be arranged in respect of the period of the bailment as to user, repairs, insurance, rights of retaking possession on the hirer's default, and various other matters. A hire-purchase agreement is, therefore, in practice a complex arrangement. Thus, when, in the letter
E of Dec. 8, 1937, the condition of hire purchase was introduced into what had seemed, on the letters, to be proceeding as a contract of sale, there was a complete change in the character of the transaction, and a complex arrangement had necessarily to be substituted for a simple agreement to sell. It was not even clear who were to be parties to the hire-purchase
F agreement, or what their respective roles were to be. The respondents, it is clear, were necesssary parties. The appellants also were necessary parties, because it was their chattel which was being dealt with. The finance company was also a necessary party. However, there were at least two possible ways of carrying out the deal. The hire-purchase
G agreement might be in such terms that the appellants were the letters and the respondents the hirers, and the purchase price was to be discharged by periodic instalments in the form of negotiable instruments, payable to the appellants, thus enabling the appellants to discount the bills with the finance company, who, on the security of the bills drawn by the
H respondents and indorsed by the appellants, would pay the appellants the purchase price at once, keeping as their eventual profit the extra amount which was added to the price for interest and bank charges. Such an arrangement must obviously involve the making of a special tripartite agreement. Another possible method would be for the appellants to agree with the respondents to sell the van to the finance company

on the stipulation that the latter should agree to let the van to the respondents under a hire-purchase agreement. Clearly in that case also a special tripartite agreement would be necessary. There was perhaps a third possible mode under which the appellants sold the van for cash (at least as regards the balance, for the transaction was, in part, barter) to the respondents, who, having become purchasers, then transferred the van to the finance company on a hire-purchase agreement in consideration of the company advancing the price. Even in such a case, the appellants would, I think, in practice be a necessary party, because the finance company would require the undertaking of the appellants to transfer the van direct to them and the respondents' concurrence in that undertaking. Otherwise, the finance company would be paying cash without at once obtaining their security in the form of the van. Thus a tripartite agreement would be necessary. However, I need not consider that case, because it was clearly not contemplated by the parties. The correspondence shows that the terms of the hire-purchase agreement were to be matters of joint concern to the three parties who were to agree upon them. What is clear is that, while a hire-purchase agreement was being demanded, its exact form and its exact terms were left for future agreement. The true view may be that the letter of Dec. 8, 1937, amounts to nothing more than an announcement that the deal is only to proceed upon a hire-purchase basis, the parties anticipating that the terms of such an agreement would be settled between them in due course.

What I have said will sufficiently explain why I do not feel able to agree with MacKinnon, L.J., that there was a complete and enforceable agreement concluded between the parties. He cited *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (2) in support of his view, but that was a quite different case. There was in that case a contract for the supply of Russian timber in 1930, which also gave an option to the buyers to purchase a further supply of 100,000 standards in the ensuing year. The option clause was extremely bare and meagre, but it was held as a matter of construction that the 100,000 standards were to be soft wood goods of fair specification for delivery during 1931. It was decided by this House, reversing the judgment of the Court of Appeal and restoring the judgment of MacKinnon, J., that no further agreement was necessary or contemplated. The court could not, indeed, make a contract for the parties, or go outside the words they had used, except in so far as there were appropriate implications of law, as, for instance, the implication of what was just and reasonable where the contractual intention was clear but the contract was silent in some detail which the court could thus fill in. Thus the condition of " fair specification over the season " 1931 enabled the court, with the help of expert evidence, to identify what was a fair and reasonable specification and a fair and reasonable distribution by way of instalment deliveries of the contract quantity. Certain other matters were similarly dealt with. In the same way, the court has, in proper circumstances, found itself able to determine what is a reasonable price when the price is not specified in the contract, as was done in *Foley* v. *Classique Coaches, Ltd.* (6), rightly, as I think, distinguishing *May & Butcher, Ltd.* v. *R.* (5), or to determine what is a reasonable time, or what are reasonable instalments. Many other examples of this principle might be given. In addition, the court may import terms on the proof of custom or by implication. However, it is, in my opinion, a very different matter to make an entire contract for the parties, as the court would be doing if the course suggested by MACKINNON, L.J., was adopted. That is simply making a contract for the parties. The analogy he cited of a c.i.f. contract is, in my opinion, no true analogy. These initial letters have a definite and complete meaning under the law merchant, just as much as the meaning of a bill of exchange, or the general effect of a marine insurance contract, is determined by the law merchant. The law has not defined, and cannot of itself define, what are the normal and reasonable terms of a hire-purchase agreement. Though the general character of such an agreement is familiar, it is necessary for the parties in each case to agree upon the particular terms. It may perhaps be that this might be done in particular circumstances by general words of reference. For instance, if it were stipulated that there should be "a usual" hire-purchase agreement, the court might be able, if supplied with appropriate evidence, to define what are the terms of such an agreement. However, there was nothing of the sort in this case, and I reserve my opinion on any such hypothetical case. I think this appeal should be allowed.

Appeal allowed.

Solicitors: *A. P. Browne & Co.* (for the appellants); *George L. Barnett & Co* (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

METROPOLITAN LEATHER CO., LTD., *v.* HERRMANN.

[CHANCERY DIVISION (Farwell, J.), **December 10, 1940.**]

Landlord and tenant—War damage—Notice of disclaimer—Order of court—Transfer of proceedings from county court to High Court—Ex parte application—County Courts Act, 1934 (*c.* 53), *s.* 111—*Landlord and Tenant* (*War Damage*) *Act,* 1939 (*c.* 72) *ss.* 13, 23.

Application under the County Courts Act, 1934, s. 111, to have proceedings removed from the county court to the High Court is made, in the case of proceedings removed to the Chancery Division, by originating summons or motion, and such application may be made *ex parte.*

[EDITORIAL NOTE. This is merely a practice note on the procedure upon the removal of proceedings from the county court to the Chancery Division of the High Court. Since such a transfer may involve a considerable addition to the cost of the proceedings, it would seem proper that all parties should be before the court.

AS TO TRANSFER OF PROCEEDINGS FROM THE COUNTY COURT, see HALSBURY, Hailsham Edn., Vol. 8, pp. 232-234, paras. 424-429; and FOR CASES, see DIGEST, Vol. 13, pp. 495, 496, Nos. 445-456.]

Case referred to:

(1) *Clavering* v. *Conduit Mead Co.* [1941] 1 All E.R. 30; Digest Supp.

MOTION *ex parte* under the County Courts Act, 1934, s. 111, to remove proceedings from Southwark County Court to the Chancery Division. Proceedings for disclaimer under the Landlord and Tenant (War Damage) Act, 1939, had been commenced in Southwark County Court by the tenant, who wished to disclaim the whole property, which had been injured by enemy action. The landlord claimed that the property was only partly damaged, that it was a multiple lease, and that the disclaimer should be allowed in respect of part only of the property. The tenant applied to have the proceedings removed to the Chancery Division under the County Courts Act, 1934, s. 111. The practice is set out in THE ANNUAL PRACTICE, 1940, p. 2593, and DANIELL'S CHANCERY FORMS, 7th Edn., p. 858.

J. B. Pennycuick for the applicant.

The respondents did not appear and were not represented.

FARWELL, J. : Having regard to the procedure laid down in THE ANNUAL PRACTICE, 1940, it appears to be the practice to make these applications *ex parte*. It seems to me to be a somewhat odd procedure, as the other side may object to the proceedings being transferred from the county court to the Chancery Division. MORTON, J., made an order in *Clavering* v. *Conduit Mead Co.* (1), for the transfer of proceedings from the county court to the Chancery Division, but the other side were present on that occasion. I will make an order for the transfer of these proceedings, but the order will contain a direction that the opponents can move on 2 days' notice to have the order dismissed. I do not think that I can refuse the order merely because it is made *ex parte*.

Application allowed with liberty to respondents to move on 2 *days' notice to have the order discharged.*

Solicitors : *Constant & Constant* (for the applicants).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

CLAVERING *v.* CONDUIT MEAD CO.

[CHANCERY DIVISION (Morton, J.), **December 6, 1940.]**

Landlord and Tenant—War damage—Notice of disclaimer—Ground lease—Order of court—Transfer of proceedings from county court to High Court—County Courts Act, 1934 (*c.* 53), *s.* 111—*Landlord and Tenant* (*War Damage*) *Act,* 1939 (*c.* 72), *ss.* 13, 23.

Premises the subject of a 99-years' ground lease were injured by enemy action, and 3 out of 4 of the subtenants disclaimed their subleases. The lessee desired to disclaim his lease, and for this purpose it was necessary to obtain an order of the court. The appropriate court in normal circumstances would be the county court, but, as the claim was very large, as expert evidence would be required, and as the Act had not yet been construed by the court, application was made to transfer the proceedings to the High Court :—

HELD : in the circumstances, the proper course was to transfer the proceedings to the High Court.

[**EDITORIAL NOTE.** This is the first occasion on which the question of disclaimer of a lease under the Landlord and Tenant (War Damage) Act, 1939, has come before the court. No question of the construction of its main provisions here arises, the sole question being the propriety of an immediate transfer of the proceedings to the High Court, so that the important questions arising may be there dealt with at once, and not by the procedure of a hearing in the county court followed by an appeal to the High Court.

A

As to Transfer of Actions from County Court to High Court, see HALSBURY, Hailsham Edn., Vol. 8, pp. 232-234, paras. 424-429; and for Cases, see DIGEST, Vol. 13, pp. 495, 496, Nos. 445-456.]

Case referred to:

B

(1) *Banks* v. *Hollingsworth*, [1893] 1 Q.B. 442; 16 Digest 405, *2509*; 62 L.J.Q.B. 239; 68 L.T. 477; *affg.* S.C. *sub nom. Banks* v. *Barclay* (1892), 67 L.T. 861.

MOTION asking that the original application by Sir Albert Clavering, pending in the Westminster County Court, for leave to disclaim C against the Conduit Mead Co. under the Landlord and Tenant (War Damage) Act, 1939, should be transferred to the Chancery Division of the High Court. The premises for which disclaimer was sought were the subject of a building agreement for a ground lease for 99 years, dated Dec. 13, 1937, between the applicant and the respondent company D at a yearly rent of £5,125, the applicant having paid a premium of £2,500 and deposited £12,500 as a security in the National Provincial Bank in the name of the Conduit Mead Co. The premises were situated at the corner of New Bond Street and Conduit Street, London, and were heavily damaged by enemy action. The application that the proceedings E should be transferred to the Chancery Division was made pursuant to the Landlord and Tenant (War Damage) Act, 1939, s. 23, and the County Courts Act, 1934, s. 111, the practice for which is set out in THE ANNUAL PRACTICE, 1940, p. 2593. The facts are fully set out in the judgment.

F *Roger Turnbull* for the applicant.

S. P. J. Merlin for the respondents.

MORTON, J.: This is an application by Sir Albert Clavering that G an original application pending in the Westminster County Court against the Conduit Mead Co. at the suit of Sir Albert Clavering, the short reference thereto being *Clavering* v. *Conduit Mead Co.*, may be transferred to the Chancery Division of this court and be assigned to myself, pursuant to the Landlord and Tenant (War Damage) Act, 1939, H s. 23, and the County Courts Act, 1934, s. 111.

The facts of the application I can state quite shortly. The ground of the application by Sir Albert Clavering is that, under an agreement with the Conduit Mead Co., he has, within the meaning of the Landlord and Tenant (War Damage) Act, 1939, a ground lease, and, the premises having been damaged by enemy action, he desires to disclaim that ground lease. Sect. 13 of the Act provides as follows :

> (1) In relation to a ground lease, this part of this Act shall have effect subject to the modifications specified in this section. (2) The tenant shall not be entitled to serve a notice of retention nor, unless the court otherwise orders, a notice of disclaimer. . . .

It is therefore necessary for Sir Albert Clavering, in order to disclaim, to obtain an order of the court. Sect. 23 of the Act provides as follows :

> Subject to the provisions of the County Courts Act, 1934, s. 111 (which provides for the removal into the High Court of any proceedings commenced in a county court), the jurisdiction of the court under this Act shall be exercised by a county court.

The County Courts Act, 1934, s. 111, so far as material, provides as follows :

> (1) The High Court or a judge thereof may order the removal into the High Court, by writ of *certiorari* or otherwise, of any proceedings commenced in a county court, if the High Court or judge thereof thinks it desirable that the proceedings should be heard and determined in the High Court. . .

It is therefore necessary that I should think it desirable that the proceedings in question should be heard and determined in the High Court before I make this order. In the Chancery Division, the order is not by writ of *certiorari*, but the words " or otherwise " cover the present proceedings. Having considered the circumstances of this case, I do think it desirable that the proceedings should be heard and determined in the High Court. In arriving at that conclusion, I have been assisted by being referred to the observations of LORD ESHER, M.R., in *Banks* v. *Hollingsworth* (1), at pp. 447, 448. Apart from the fact that the amount involved in the present case is, or may be, a very large amount, the rent reserved under the lease being a very substantial rent, it would appear likely that expert evidence may be required on certain matters. However, more than that, the Landlord and Tenant (War Damage) Act, 1939, is a recent Act. There is, so far, an absence of judicial decision upon certain important questions of law which may arise in this case. Counsel for the applicant and counsel for the respondent agree that it is likely that important questions of law will arise, as to which there has not been any previous decision. The application is not opposed. In fact, it is supported by the Conduit Mead Co. In all these circumstances, I think that it is right that I should make the order asked for, directing that the original application in question may be transferred to the Chancery Division and assigned to myself.

Motion allowed. Costs of this motion to be costs in the application.

Solicitors : *Hyman, Isaacs, Lewis & Mills* (for the applicants); *Capron & Co.* (for the respondents).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Dictum of LORD RUSSELL OF KILLOWEN, at p. 46, *applied.* MURDOCK LOWNIE, LTD. *v.* NEWMAN [1949] 2 All E.R. 783.

Dicta of LORD RUSSELL OF KILLOWEN and LORD ROMER, at pp. 44, 64, *applied.* FOWLER *v.* BRATT. [1950] 1 All E.R. 662.

Dictum of LORD RUSSELL OF KILLOWEN, at p. 47, *applied.* BENNETT, WALDEN & CO. *v.* WOOD. [1950] 2 All E.R. 134.

LUXOR (EASTBOURNE), LTD. (IN LIQUIDATION) AND OTHERS *v.* COOPER.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Romer), **August 7, 8, 12, 13, 14, 15, 19, December 12, 1940.]**

Agency—Remuneration—Commission—Contract to pay commission on completion of sale of property—Willing purchaser found—Justification of refusal to complete—Transaction carried through by sale of shares in company and not by sale of company's property.

The appellant companies wished to dispose of certain property, and agreed to pay the respondent a commission on the completion of the sale to any purchaser whom he could introduce. He did in fact introduce a willing and able purchaser, but the appellant companies then determined to effect the transaction they had in mind by a sale of the shares of the companies, and not to proceed with the sale of the property. It was contended that there ought to be implied in the agreement with the respondent a term to the effect that the appellants would not without just cause so act as to prevent him from earning his commission :—

HELD : there can be no implied term that the vendor will not refuse to go on with a proposed sale so long as matters are still in negotiation and no binding contract has been made between the vendor and the purchaser. There was, therefore, no breach of contract by the appellant companies and they were not liable to the respondent in damages. The question of just cause or reasonable excuse did not, therefore, arise.

Decision of the Court of Appeal ([1939] 4 All E.R. 411) *reversed.*

Trollope (George) & Sons v. *Martyn* (1) and *Trollope (George) & Sons* v. *Caplan* (5) *overruled.*

[**EDITORIAL NOTE.** It is settled that, where a sale and purchase of property is made "subject to contract," either party can withdraw from the bargain until formal contracts duly executed are exchanged. It is clear from this that an agent who has secured a provisional contract is placed in a very awkward position. He is anxious not to place the property before other possible purchasers, because they will probably be told by the vendor that it is already sold. It was held by the Court of Appeal that, while the vendor, in such circumstances, could repudiate the provisional contract as against the purchaser, if he did so without proper cause, he would still be liable to the agent in respect of the commission, or, at any rate, a part of it. Upon this there followed a number of decisions as to what was a "reasonable cause" for the vendor so repudiating his provisional contract. The House of Lords have decided herein that the decision upon which the whole of this law was based—namely, *Trollope & Sons* v. *Martyn Bros.* (1)—was wrongly decided and have overruled it. It must be carefully noted, however, as their Lordships repeatedly point out, that the decision on any such agreement for the payment of commission is always only the construction of that particular agreement and is wholly dependent upon the precise wording of the agreement. However, for practical purposes, these agreements divide themselves into certain fairly well defined classes, and the particular type of agreement here considered is that where the commission is made payable on the completion of the purchase. In such a case, it would seem that the doctrine, if it can be so called, of "just and probable cause" cannot now be invoked, for it is held that the vendor may repudiate the provisional contract without incurring any liability to the agent. This, however, is stating the decision herein in broad terms. The strictly accurate statement is that it must be no wrongful act on the part of the employer of the agent which prevents the completion of the purchase. If the act is one which the law does not allow the employer to do (i.e., as between the employer and the purchaser), then, it appears, the agent may sue for breach of his contract.

AS TO JUSTIFICATION OF VENDOR IN REFUSING TO CONTINUE NEGOTIATIONS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 261, 262, para. 435; and FOR CASES, see DIGEST, Vol. 1, pp. 508-512, Nos. 1753-1769.]

Cases referred to:

(1) *Trollope (George) & Sons* v. *Martyn Bros.*, [1934] 2 K.B. 436; Digest Supp.; 103 L.J.K.B. 634; 152 L.T. 88.

(2) *Bentall, Horsley & Baldry* v. *Vicary*, [1931] 1 K.B. 253; Digest Supp.; 100 L.J.K.B. 201; 144 L.T. 365.

(3) *Mackay* v. *Dick* (1881), 6 App. Cas. 251; 12 Digest 431, *3494*.

(4) *Inchbald* v. *Western Neilgherry Coffee, Tea, & Cinchona Plantation Co., Ltd.* (1864), 17 C.B.N.S. 733; 1 Digest 542, *1952*; 34 L.J.C.P. 15; 11 L.T. 345.

(5) *Trollope (George) & Sons* v. *Caplan*, [1936] 2 K.B. 382; [1936] 2 All E.R. 842; Digest Supp.; 105 L.J.K.B. 819; 155 L.T. 365.

(6) *Prickett* v. *Badger* (1856), 1 C.B.N.S. 296; 1 Digest 509, *1754*; 26 L.J.C.P. 33.

(7) *Kahn* v. *Aircraft Industries Corpn., Ltd.*, [1937] 3 All E.R. 476; Digest Supp.

(8) *Cutter* v. *Powell* (1795), 6 Term Rep. 320; 34 Digest 88, *649*.

(9) *Simpson* v. *Lamb* (1856), 17 C.B. 603; 1 Digest 494, *1697*; 25 L.J.C.P. 113; 26 L.T.O.S. 203.

(10) *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256; 1 Digest 540, *1944*; 47 L.J.Q.B. 396; 34 L.T. 890.

(11) *Turner* v. *Goldsmith*, [1891] 1 Q.B. 544; 1 Digest 541, *1946*; 60 L.J.Q.B. 247; 64 L.T. 301.

12) *Reigate* v. *Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592; 12 Digest 611, *5052*; 87 L.J.K.B. 724; 118 L.T. 479.

(13) *French (L.) & Co.* v. *Leeston Shipping Co.*, [1922] 1 A.C. 451; 12 Digest 612, *5054*; 91 L.J.K.B. 655; 127 L.T. 169.

(14) *Howard-Houlder & Partners, Ltd.* v. *Manx Isles S.S. Co.*, [1923] 1 K.B. 110; Digest Supp.; 92 L.J.K.B. 233; 128 L.T. 347.

(15) *Planche* v. *Colburn* (1831), 8 Bing. 14; 12 Digest 350, *2906*; 1 L.J.C.P. 7.

APPEAL by the two companies, respondents in the Court of Appeal, from a judgment of the Court of Appeal (SCOTT, MACKINNON and DU PARCQ, L.JJ.), dated Dec. 4, 1939, and reported [1939] 4 All E.R. 411, reversing a judgment of BRANSON, J., dated Feb. 7, 1939, and reported [1939] 1 All E.R. 623. The facts are fully set out in the opinion of VISCOUNT SIMON, L.C.

A. T. Miller, K.C., *H. St. John Field, K.C.*, and *F. W. Beney* for the appellants.

W. H. Cartwright Sharp, K.C., and *Cyril Miller* for the respondent.

VISCOUNT SIMON, L.C.: My Lords, in this case, the respondent, who was plaintiff in the action, issued his writ in Apr., 1937, claiming from each of the two appellant companies a sum of £5,000 as commission alleged to be due under a verbal agreement made in Sept., 1935. Alternatively, he claims the same amount as damages for breach of this agreement. The trial judge, BRANSON, J., decided in favour of the appellants, but the Court of Appeal reversed this decision and gave judgment in favour of the respondent for a total sum of £8,000 as damages for breach of a term alleged to be implied in the commission agreement to the effect that the appellants would not without just cause so act as to prevent the respondent from earning his commission.

The appellants are private companies, and were the freeholders of the

Luxor Cinema at Eastbourne and of the Regal Cinema at Hastings respectively. The board of directors of each of the appellant companies was composed of the same individuals, and one Garton was solicitor to each company. Their auditor was one Ewbank. Prior to his death on Sept. 11, 1935, one Walter Bentley, who was managing director of both companies, held the majority of the issued ordinary shares in Regal (Hastings), Ltd., and also a large block of issued ordinary shares in Luxor (Eastbourne), Ltd. On Walter Bentley's death, his son, Harry Bentley, became a director in his place. Harry Bentley and his mother were administrators of the estate of Walter Bentley. In the summer of 1935, Walter Bentley had asked Ewbank to get an offer for the purchase of the Luxor and Regal Cinemas, and Ewbank said that he would approach his "client," meaning the respondent. Ewbank gave evidence that Bentley had said that he would see to it that Ewbank was paid a commission, but matters had not developed further before Walter Bentley's death. On Sept. 16, Ewbank told Griffiths (who was one of the directors of the two companies) of his conversations with the late Bentley, and two days later, after a directors' meeting of one of the appellant companies (as to which, however, no minute was produced), Griffiths told Ewbank that the directors had decided to sell, and that Ewbank's client should make his offer through Garton, who had the authority of the directors to deal with the matter. The next day Ewbank told the respondent of this, and the latter shortly afterwards introduced to Ewbank Colonel Burton, who was a director of the London and Southern Super Cinemas, Ltd., as willing to negotiate for the properties on behalf of that company. Ewbank took the respondent and Colonel Burton to meet Garton. Shortly before the meeting, Ewbank and the respondent had a preliminary meeting with Garton, when the respondent told Garton he wanted £10,000 as commission "to cover both himself and Ewbank."

It appears that Regal (Hastings), Ltd., was in a position to obtain leases of two more cinemas at Hastings, called the Elite and the De Luxe, without cost to themselves, and on Sept. 26, 1935, a company called Hastings Amalgamated Cinemas, Ltd., was formed by Regal (Hastings), Ltd., to acquire these leases, the intention being that they should be included in the proposed sale to Colonel Burton's company. However, instead of the shares in Hastings Amalgamated Cinemas, Ltd., being all taken up by Regal (Hastings), Ltd., the directors and Garton between them hit upon a plan by which they should themselves apply for 3,000 out of the 5,000 shares to be issued at par, so that Regal (Hastings), Ltd., could be allotted only 2,000 shares. As it was intended that out of the total purchase price of the four cinemas £15,000 was to be allotted for the purchase of the two leasehold cinemas (for which Hastings Amalgamated Cinemas, Ltd., had paid nothing), the result of this scheme would have been that the directors and Garton would have obtained for themselves a profit amounting to £6,000, which would otherwise have accrued to Regal (Hastings), Ltd., and its shareholders.

The discussions between Ewbank, Garton and Colonel Burton continued, and, at an interview the date of which is not precisely fixed, but which was some day after Sept. 19, Garton told Colonel Burton that he wanted a net purchase price for the four cinemas of £175,000, to which £10,000 would have to be added for commission, making a total of £185,000. Colonel Burton agreed "subject to contract," and gave evidence at the A trial that his company, London and Southern Super Cinemas, Ltd., remained throughout, as the appellants knew, able and willing to buy the properties for this figure.

On Oct. 2, Ewbank wrote to Garton enclosing a letter of the same date written by Colonel Burton on behalf of his company offering £185,000 B for the various properties, subject to contract, and Ewbank's letter went on to say:

> These offers are subject to your clients confirming to Mr. Norman Cooper . . . . the agreed procuration fees—namely £5,000 to be paid by each of the vendor companies, making a total of £10,000. The payments to be made on the completion of the purchases. C

On Oct 11, Garton's firm replied to Ewbank as follows:

> We are instructed by our clients to confirm that, on completion of the sale of the two leasehold cinemas at Hastings, and the freehold cinemas at Hastings and Eastbourne, respectively, to the London and Southern Super Cinemas, Ltd., a procuration fee of £10,000 is to be paid to Mr. Norman Cooper, being £5,000 in respect of each of the freehold cinemas at Hastings and Eastbourne.

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There was a board meeting of the directors of Regal (Hastings), Ltd., on Oct. 2, at which Garton reported the offer which he had received and stated the commission demanded. The majority of the directors present were in favour of accepting the offer, but Harry Bentley opposed the motion, and this was followed up next day by a letter from Bentley's E solicitors, writing in the interests of the late Walter Bentley's estate, objecting to the size of the commission and also criticising the way in which the shares in Hastings Amalgamated Cinemas, Ltd., were being taken up. The letter asked for an assurance that the proposals put before the board on the previous day would not be carried out, and added that, F if this assurance was not given, it would be necessary to consider the necessity of making an immediate application to the court. There are no directors' minutes produced to show how this letter was dealt with, and it may seem somewhat surprising that Garton's firm should none the less have written on Oct. 8 accepting Colonel Burton's offer, and, as G already stated, should have sent a confirmation on Oct. 11 to Ewbank of the proposed arrangements about commission to be paid to Cooper. Neither Garton nor any of the directors was called as a witness at the trial, and these matters were not cleared up. What, however, is more important is that, in the light of Bentley's protest, the sale to Colonel Burton's H company was not proceeded with. Indeed, no draft contract was ever submitted, and the disposal of the cinemas ultimately took place by way of a sale of shares in the appellant companies to another party.

The question now to be decided is whether the appellant companies are liable to the respondent in damages for not carrying through the sale to Colonel Burton's company, in which case the respondent would have earned his commission. In the present case, no commission note addressed to the respondent is produced, and the express contract is not contained in any document. The proof of it mainly depends on evidence given by the respondent at the trial in Feb., 1939, of the interview which he had A with the appellants' solicitor, Garton, apparently late in Sept., 1935. There has been much argument whether it was proved that Garton had authority to act for the appellant companies in selling the properties and arranging the commission. Direct evidence of authority there is none, but I think, as did the trial judge and the Court of Appeal, that the B minutes of the board meetings of the two companies, fragmentary as they are, are sufficient to provide ratification of Garton's agency. The respondent's verbal account of the terms of the commission contract may be filled in by the letter from Garton and company to Ewbank (who was to get 40 per cent. of the commission for himself), dated Oct. 11, C 1935, confirming that a "procuration fee" of £10,000 was payable on the sale to London and Southern Super Cinemas, Ltd., and that the commission was to be provided in equal shares by the two appellant companies—two points not mentioned in the verbal evidence.

Such being the materials out of which the express contract has to be D pieced together, what is the result? It seems to me that the express bargain was simply this. If a party introduced by the respondent should buy the cinemas for at least £185,000, each of the two appellants would pay to the respondent £5,000 on the completion of the sale. No such sale, however, took place. Accordingly, there can be nothing due E to the respondent on the terms of the express bargain. It is said, however, that, since the proposed purchasers introduced by the respondent were, and remained, willing and able to buy the properties for the minimum price, while the appellants did not close with the offer, the appellants are liable in damages to the respondent for breach of an implied term F of the commission contract. In the statement of claim, the implied term is said to be that the appellants would

> . . . do nothing to prevent the satisfactory completion of the transaction so as to deprive the respondent of the agreed commission.

The breach pleaded is the failure to complete the contract of sale G with the respondent's client and the disposal of the subject-matter in another quarter.

The implied term thus alleged is in any case too widely expressed, for the authorities relied on in support of the view that the express contract involves an implied term of this sort concede that the alleged H obligation on the vendor to complete the transaction if the commission agent's nominee remains able and willing to buy does not extend to cases where the vendor has "reasonable cause" for refusing to complete: *per* GREER, L.J., in *Trollope* (*George*) *& Sons* v. *Martyn Bros.* (1), at p. 452, or, as MAUGHAM, L.J., expressed it, at p. 458, "where there is no default on the part of the vendor."

What amounts to "reasonable cause" in this connection? If, in the course of negotiating the contract of sale, the parties come to loggerheads, how is the allocation of "default" determined? In the present case, BRANSON, J., thought that "reasonable cause" existed, while the Court of Appeal considered that it did not. In his dissenting judgment in *Trollope (George) & Sons* v. *Martyn Bros.* (1), SCRUTTON, L.J., said that he could not agree with the view that it is [p.444]:

> . . . necessary to imply a term that the employers shall not "without just cause" prevent the agent from earning his commission, and as a corollary that if he "arbitrarily" (by which phrase I understand him to mean) "without alleging any just excuse" refuses to sell, he is (*vis-a-vis* the agent) in default, though in an agreement subject to contract he breaks no contract with the purchaser by refusing to complete without giving any reason. I cannot agree with this view which seems to make the subsidiary matter, the remuneration of the agent who is to obtain a contract of sale, as of more importance than the sale itself, which without breach of any contract with the purchaser has not been completed or materialised. It does not seem to me that a vendor taking an attitude towards the purchaser which by his contract he is entitled to adopt, if he gives no reason why he so acts except that it is in the bond, is acting arbitrarily and therefore in some unspecified default. Every man who receives and refuses without giving a reason an offer which he is not bound to accept, may be said to act arbitrarily, but I cannot understand why he is in default.

The implied term upon which the respondent relies, following *Trollope (George) & Sons* v. *Martyn Bros.* (1), amounts to saying that, once he has introduced his duly qualified nominee, the appellants must look in no other direction for a purchaser, but are bound, in the absence of "just excuse," to do their best to sell to that nominee. It appears to me that this proposition leads to great difficulties in its application, and to great uncertainty as to what might amount to a just excuse. In the present case, the respondent was not appointed sole agent, and there might have been half-a-dozen competitors for the proffered commission. If the respondents' introduction of his nominee had been immediately followed by a better offer through another agent, would the appellants have been bound to refuse the latter, or to accept it only with the consequence of paying two commissions? If, after receiving the respondent's "name," and before becoming bound by contract of sale, the appellants sold the property to another purchaser without the intervention of any agent at all, would this expose the appellants to a claim by the respondent for damages? The contrary has been held, I think correctly, by MCCARDIE, J., in *Bentall, Horsley & Baldry* v. *Vicary* (2). Again, what would be the rights of the agent if he were employed on precisely corresponding terms to find a tenant for a house at a named rent? Can it be that the owner would be bound to accept the first tenant so offered to him who was willing to pay the rent? How would matters stand in such a case where the house was to be let furnished and the selection of a suitable tenant was, therefore, of particular concern to the landlord?

I find it impossible to formulate with adequate precision the tests which should determine whether or not a "just excuse" exists for disregarding the alleged implied term, and this leads me to consider whether there really is any such implied term at all. The matter may be tested in this way. If such an implied term must be assumed, then this amounts to saying that, when the owner gives the agent the opportunity of earning commission on the express terms thus stated, the agent might have added : " From the moment that I produce a duly qualified offeror, you must give up all freedom of choice, and carry through the bargain, if you reasonably can, with my nominee." The vendor must reply : " Of course. That necessarily follows." However, I am by no means satisfied that the vendor would acquiesce in regarding the matter in this light. I doubt whether the agent is bound, generally speaking, to exercise any standard of diligence in looking for a possible purchaser. He is commonly described as " employed," but he is not " employed " in the sense in which a man is employed to paint a picture or to build a house, with the liability to pay damages for delay or want of skill. The owner is offering to the agent a reward if the agent's activity helps to bring about an actual sale, but that is no reason why the owner should not remain free to sell his property through other channels. The agent necessarily incurs certain risks, *e.g.*, the risk that his nominee cannot find the purchase price, or will not consent to terms reasonably proposed to be inserted in the contract of sale. I think that, upon the true construction of the express contract in this case, the agent also takes the risk of the owner not being willing to conclude the bargain with the agent's nominee. This last risk is ordinarily a slight one, for the owner's reason for approaching the agent is that he wants to sell.

If it really were the common intention of owner and agent that the owner should be bound in the manner suggested, there would be no difficulty in so providing by an express term of the contract, but, in the absence of such an express term, I am unable to regard the suggested implied term as " necessary." The well-known line of authorities, of which *Mackay* v. *Dick* (3) is a leading example, does not, in my opinion, lead to the conclusion drawn from them by the majority of the Court of Appeal in *Trollope (George) & Sons* v. *Martyn Bros.* (1). If A employs B for reward to do a piece of work for him which requires outlay and effort on B's part, and which depends on the continued existence of a given subject-matter which is under A's control (as in *Inchbald* v. *Western Neilgherry Coffee, Tea, & Cinchona Plantation Co., Ltd.* (4)), there may be an implied term that A will not prevent B from doing the work by destroying the subject-matter, and, generally speaking, where B is employed by A to do a piece of work which requires A's co-operation—*e.g.*, to paint A's portrait—it is implied that the necessary co-operation will be forthcoming—*e.g.*, A will give sittings to the artist. The work which the respondent was invited to do, however, was to produce an offer for the property—a piece of work which does not require the appellants' co-operation at all (except in giving a prospective purchaser reasonable opportunity to inspect the property, which no doubt would be an implied term)—and I am unable to deduce from the fact that the respondent was invited to produce an offer the implication that the appellants promised the respondent that they would accept it unless "just excuse" for refusal existed.

In my view, therefore, the respondent's claim fails, because the implied term suggested is not proved to exist, and it is unnecessary to consider whether the objections taken on behalf of Harry Bentley in the letter of Oct. 3, and the risk of controversy or litigation arising if the original scheme had been carried through, constituted "just cause" for failing to accept Colonel Burton's offer. I am unwilling unnecessarily to comment on the action of Garton and the directors in proposing themselves to subscribe for the majority of the shares in Hastings Amalgamated Cinemas, Ltd., since they were not parties to the present litigation, and the decision whether they should be called as witnesses or not presumably did not rest with them. Their explanation, whether good or bad, has not been heard in this action.

In concluding his judgment in *Trollope* (*George*) *& Sons* v. *Caplan* (5), Sir Wilfrid Greene, M.R., expressed the view, at p. 401, that the case law as to the rights and obligations of house-agents and their clients with regard to the sort of questions then under discussion was not in a very satisfactory condition, and that it was desirable that the whole position should be reviewed, if opportunity offered, in the House of Lords. du Parcq, L.J., in the present case expressed his agreement with this view. I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Wright, in which he examines a number of the cases, on which I do not myself comment in this opinion, and I am glad to adopt his conclusions concerning them.

There is, I think, considerable difficulty, and no little danger, in trying to formulate general propositions on such a subject, for contracts with commission agents do not follow a single pattern, and the primary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion, and then to consider whether these express terms necessitate the addition, by implication, of other terms. There are some classes of contract in which an implied term is introduced by the requirements of a statute—for example, under the Sale of Goods Act or the Marine Insurance Act. There are other contracts where an implied term is introduced by the force of established custom—for example, the necessity of a month's notice in the case of hiring a domestic servant. In contracts made, however, with commission, there is no justification for introducing an implied term unless it is necessary to do so for the purpose of giving to the contract the business effect which both parties to it intend that it should have. It may be useful to point out that contracts under which an agent may be occupied in endeavouring to dispose of the property of a principal fall into several obvious classes. There is the class in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer, usually an offer of not less than the stipulated amount. If that is all that is needed in order to earn his reward, it is obvious that he is entitled to be paid when this has been done, whether his principal accepts the offer and carries through the bargain or not. No implied term is needed to secure this result. There is another class of case in which the property is put into the hands of the agent to dispose of for the owner, and the agent accepts A the employment, and, it may be, expends money and time in endeavouring to carry it out. Such a form of contract may well imply the term that the principal will not withdraw the authority he has given after the agent has incurred substantial outlay, or, at any rate, after he has succeeded in finding a possible purchaser. Each case turns on its own facts, and B the phrase "finding a purchaser" is itself not without ambiguity. *Inchbald's* case (4) might, I think, be regarded as falling within this second class. However, there is a third class of case, to which the present instance belongs, where, by the express language of the contract, the agent is promised his commission only upon completion of the trans- C action which he is endeavouring to bring about between the offeror and his principal. As I have already said, there seems to me to be no room for the suggested implied term in such a case. The agent is promised a reward in return for an event, and the event has not happened. He runs the risk of disappointment, but, if he is not willing to run the risk, D he should introduce into the express terms of the contract the clause which protects him.

The oft-quoted case of *Prickett* v. *Badger* (6) must, I think, be regarded as turning on its special facts, which were very unusual. There the defendant invited the plaintiff to concern himself, for reward, in the sale of a E piece of freehold land, although the defendant had no interest in the land whatsoever. I can well understand that, in such circumstances, the plaintiff, after incurring outlay and exerting himself to produce the would-be purchaser, could make good a claim for a *quantum meruit*. The report attributes to POLLOCK, C.B., who tried the case at assizes, F the assertion that, if a man places in the hands of several house-agents a house which he is desirous of letting or selling :

> . . . though the successful agent alone would be entitled to claim commission, the others would clearly be entitled to something for their trouble.

If POLLOCK, C.B., really made this observation, it certainly is not in G accordance with the usual result of arrangements made with house-agents, and it should be noted that WILLIAMS, J., mentions, at p. 305:

> The implied understanding that the agent is only to receive a commission if he succeeds in effecting a sale, but, if not, then he is to get nothing.

Trollope (George) & Sons v. *Martyn Bros.* (1) was also a case with H unusual special facts, for, though the offer produced by the plaintiffs was "subject to contract," matters had proceeded so far that the draft terms of contract proposed by the defendant had been accepted and signed by the would-be purchaser, and there was nothing whatsoever to explain why the contract did not go through other than the unwillingness of the defendant to proceed. The judgment of MAUGHAM, L.J., in favour of the plaintiffs largely turned on these special facts, and for that reason I venture to doubt whether he would necessarily have approved of the later decision in *Trollope (George) & Sons* v. *Caplan* (5), where the Court of Appeal was endeavouring to apply the earlier case. However that may be, for the reasons which I have stated, I prefer the minority view of Scrutton, L.J., in *Trollope (George) & Sons* v. *Martyn Bros.* (1), and am of opinion that that case and *Trollope (George) & Sons* v. *Caplan* (5), which followed it, were wrongly decided. I move that this appeal be allowed.

Lord Russell of Killowen: My Lords, in this case, the plaintiff seeks to recover from each of the defendant companies a sum of £5,000, alleging that that amount is due to him from each of them for commission under a contract made between himself and a solicitor named Garton who acted as legal adviser to the two companies. Garton's authority to make any such contract on their behalf was denied by the companies. The authority, if it existed, might have been proved by resolutions of board meetings conferring the authority, or by the evidence of directors, or by the evidence of Garton. No such evidence was tendered. Nevertheless, Branson, J., who tried the action, was of opinion that Garton's authority had been proved by statements in letters written by Garton, and by a minute of a meeting of the board of one of the defendant companies held on Oct. 2, 1935. The Court of Appeal agreed with this opinion of Branson, J., Had the matter rested there, it would seem that no authority had been proved at all, because Garton's letters are no evidence of the truth of any statement therein, and the minute, on its true construction, does not indicate that the two sums of £5,000 are payable by the defendant companies. The matter, however, does not rest there. There is some evidence by the witness Allwood which, vague though it is, does testify to knowledge and approval by the directors of the fact that a contract had been made binding their companies to pay the £10,000. Upon this evidence, it may possibly be said that Garton's promise on behalf of the two companies had been adopted or ratified so as to become binding upon the companies. In these circumstances, it would not, in my opinion, be right to dispose of this case summarily upon the ground that the plaintiff had failed to establish the first essential to the validity of his claim. In proceeding to discuss the other aspects of the case, I will refrain from repeating the facts which led up to this litigation. They have been fully stated, and I will assume that they are present to your Lordships' minds.

At the outset, we must ascertain the terms of the contract which Garton and the plaintiff made. The action is not brought on a commission note. The only contract pleaded and sued upon is an oral contract made between those two. The evidence as to it is quite short. It is the evidence of what occurred at an interview in Garton's office on Sept. 23, 1935, at which Garton, Ewbank, and the plaintiff were present.

Garton was not called. All that Ewbank says is that the plaintiff wanted £10,000 and that Garton "at the time agreed the figure." The plaintiff gave a rather more detailed account in the following words:

> I told Mr. Garton that I had a friend who was prepared to negotiate, and we discussed the price, and I told him I expected to get a commission. He told me the lowest price that they would take, and any commission I got would have to be added to that price. The price he gave me was £175,000. I said I was going to add £10,000 to it. He said: "As long as the purchasers do not object, I do not mind."

That is the whole of the oral evidence as to the contract. The subsequent letters between Garton and Ewbank of Oct. 2, Oct. 8, and Oct. 11, 1935, merely purport to confirm the oral agreement already made. They add nothing. They only show that, when the parties at the interview spoke of £10,000 being added to the price, they meant that £5,000 would be added to the price received by each of the two companies, and that each company would only be liable for its £5,000 accordingly. Upon the oral evidence, the only contract between the parties was one which, in my opinion, must be stated thus: "If a particular friend of the plaintiff paid at least £185,000 for the four cinemas, the two companies would each pay to the plaintiff £5,000 out of the price paid." That is the only contract proved in this case.

The next question for consideration is what liability, if any, was placed upon the companies under that contract in the event (which happened) of the contemplated sale to the plaintiff's friend never having been carried to completion, with the result that the price, in which the commission was included, was never paid. In my opinion, in that event, no liability attached to the companies. The only right of the plaintiff was to receive his commission out of the purchase moneys, if and when received. His right was a purely contingent right. He stood to earn a very large sum at comparatively small pains, taking the risk of either side withdrawing from the negotiations before any binding contract of sale and purchase was concluded, or the risk of the contract (if any) for any reason not being carried to completion. My Lords, upon this view of the oral contract which is the foundation of the plaintiff's claim, the action must fail. No question arises for the decision of this House in relation to the correctness or otherwise of the views expressed in the Court of Appeal in *Trollope (George) & Sons* v. *Martyn Bros.* (1) and *Trollope (George) & Sons* v. *Caplan* (5). The question of these commission contracts was, however, discussed at great length and in great detail before your Lordships, and this must be my excuse for stating briefly conclusions which my mind, free as it is from the fetter of previous decisions, has reached.

A few preliminary observations occur to me. (1) Commission contracts are subject to no peculiar rules or principles of their own. The law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liabilities of the principal under commission contracts are to be determined. In each case, these must depend upon the exact terms of the contract in question, and upon the true construction of those terms. (3) Contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent. There is no real analogy between such contracts and contracts of employment by which one party binds himself to do certain work and the other binds himself to pay remuneration for the doing of it.

I do not assent to the view, which I think was the view of the majority in *Trollope* (*George*) *& Sons* v. *Martyn Bros.* (1), that a mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price, or at a minimum price, ties the owner's hands and compels him, as between himself and the agent, to bind himself contractually to sell to the agent's client who offers that price, with the result that, if he refuses the offer, he is liable to pay the agent a sum equal to, or less than, the amount of the commission, either (*a*) on a *quantum meruit*, or (*b*) as damages for breach of a term to be implied in the commission contract. As to the claim on a *quantum meruit*, I do not see how this can be justified in the face of the express provision for remuneration which the contract contains. This must necessarily exclude such a claim, unless it can (upon the facts of a particular case) be based upon a contract subsequent to the original contract, and arising from some conduct on the part of the principal. As to the claim for damages, this rests upon the implication of some provision in the commission contract, the exact terms of which were variously stated in the course of the argument, the object always being to bind the principal not to refuse to complete the sale to the client whom the agent has introduced. I can find no safe ground on which to base the introduction of any such implied term. Implied terms, as we all know, can be justified only under the compulsion of some necessity. No such compulsion or necessity exists in the case under consideration. The agent is promised a commission if he introduces a purchaser at a specified or minimum price. The owner is desirous of selling. The chances are largely in favour of the deal going through if a purchaser is introduced. The agent takes the risk in the hope of a substantial remuneration for comparatively small exertion. In the case of the plaintiff, his contract was made on Sept. 23, 1935, and his client's offer was made on Oct. 2, 1935. A sum of £10,000, the equivalent of the remuneration of a year's work by a Lord Chancellor, for work done within a period of 8 or 9 days is no mean reward, and is one well worth a risk. There is no lack of business efficacy in such a contract, even though the principal is free to refuse to sell to the agent's client. The position will no doubt be different if the matter has proceeded to the stage of a binding contract having been made betweeen the principal and the agent's client. In that case, it can be said with truth that a "purchaser" has been introduced by the agent. In other words, the event has happened upon the occurrence of which a right to the promised commission has become vested in the agent. From that moment, no act or omission by the principal can A deprive the agent of that vested right.

My Lords, for myself, I do not favour the view that an agent who has not earned his commission according to the express terms of the contract is entitled to damages for breach of some term to be implied. I see no necessity which compels the implication. The view is, as I B read the authorities, founded in its origin upon the observations of WILLES, J., in *Prickett* v. *Badger* (6). I have carefully considered those observations, and I do not think that they justify the view which has been founded upon them. The case was one purely of a *quantum meruit* claim. It was not a claim for damages for breach of any contract, express C or implied. It was an action on the common counts for work and labour, on the footing that, because, owing to the principal's action, the promised commission could not be claimed, the plaintiff was entitled to be remunerated on a *quantum meruit* for the work and labour actually done. It was a claim to be remunerated in accordance with an alleged contract. D POLLOCK, C.B., who tried the case, directed the jury that the plaintiff was entitled to remuneration for his work and labour, not, be it observed, to damages for breach of contract. The jury returned a verdict for £50. It was the defendant who appealed, on the ground that the plaintiff was entitled to nothing, and it was on his appeal that a new trial on the E *quantum meruit* was ordered. The reason for this was that the verdict was manifestly insufficient, because, since the plaintiff had done the whole of the work for which, but for the defendant's action, he would have been remunerated by the commission, the *quantum* to which he must be entitled in the *quantum meruit* claim could not be only £50, F but must be a sum equal to the amount of the promised commission. That is the whole of the decision, and it is in support of that decision that WILLES, J., used the language which is relied upon in the subsequent authorities to establish the existence of the alleged implied term that the principal will not prevent the agent from earning his commission. The G judgment of WILLES, J., is short. The relevant portion runs thus, at p. 307:

> It is quite clear that the plaintiff was entitled to some remuneration. In pursuance of the retainer, he proceeded to find a purchaser for the land; and it was only the defendant's disinclination or inability to proceed that prevented the sale being completed. The plaintiff would have been entitled to receive the commission H agreed on, if the defendant's conduct had not prevented his earning it. I must confess I do not see why the jury should not have given him the full amount. The learned Judge being dissatisfied with the verdict there must be a new trial upon the terms suggested.

I can find there no hint or indication of any implied term, or of any right to damages for its breach. As I read it, the judgment deals only with the *quantum* recoverable on a claim for work and labour, and points out that the *quantum* so recoverable must, in the circumstances, be equal to the amount of the commission, since the parties had by the original contract agreed that that amount was the proper amount payable in respect of the identical amount of work and labour.

My Lords, it may be that, in the light of later authorities the plaintiff in *Prickett* v. *Badger* (6) was not, in view of the express contract, entitled to anything on a *quantum meruit*. On the other hand, he may have been so entitled, on a subsequent contract to be implied between the parties. The facts are not very clearly stated. However, this is immaterial. What is material is that the observations of Willes, J., do not, as I read them, establish the existence of the alleged implied term, or the right of the agent to recover damages for breach thereof. As I have already indicated, the case under consideration is quite different from a contract by which an agent is employed and is, by the contract of employment, bound to do specified work for the principal. Such was the case of *Inchbald* v. *Western Neilgherry Coffee, Tea, & Cinchona Plantation Co., Ltd.* (4). In such contracts, a term must, if not expressed, necessarily be implied, that the principal will do nothing to prevent the agent from doing the work which the contract binds him to do. I must confess that I find a difficulty in seeing how *Trollope (George) & Sons* v. *Martyn Bros.* (1) came to be decided in favour of the agents, in view of the terms of the contract which they had made with the principal. They introduced a proposed purchaser, who offered £20,500 subject to contract. They then were instructed by the defendants by telephone to accept the offer, subject to contract. They then wrote to the defendants a letter enclosing a copy of the offer, asking for a written acceptance, and concluding with the following words :

> We take this opportunity of confirming that in the event of the sale materialising we shall look to you for payment of the usual commission.

To that letter the defendants replied, stating that :

> . . . in the event of this sale being satisfactorily completed, we shall pay you the usual scale of commission.

I cannot imagine (upon the terms of the contract) a clearer case of the title to the commission being made wholly contingent on the sale being carried to completion and of the agents taking the risk of the sale falling through from any cause whatever. In my view, there was, on the terms of that contract, no possibility for the implication of any such term as was discussed in the judgments. Indeed, it would be a case of implying a term in variation of the express contract.

My Lords, in my opinion there is no necessity in these contracts for any implication, and the legal position can be stated thus. If, according to the true construction of the contract, the event has happened upon the happening of which the agent has acquired a vested right to the commission (by which I mean that it is *debitum in praesenti*, even though only *solvendum in futuro*), then no act or omission by the principal or

anyone else can deprive the agent of that right. Until that event has happened, however, the agent cannot complain if the principal refuses to proceed with, or carry to completion, the transaction with the agent's client. I have already expressed my view as to the true meaning of a contract to pay a commission for the introduction of a purchaser at a
A specified or minimum price. It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price, but such a construction of the contract would, in my opinion, require clear and unequivocal language.

B I will only add this in reference to the case before us. Even if I had agreed with the views of the majority of the Court in *Trollope* (*George*) *&* *Sons* v. *Martyn Bros.* (1), I would have said that the defendants had good and sufficient excuse for refusing to proceed with the sales of the cinemas. I feel little doubt that the court would have restrained the
C carrying out of the sale, at least until after the respective shareholders had been informed of the facts and had had an opportunity of expressing their views in general meeting. In my opinion, this appeal should be allowed and the order of BRANSON, J., restored.

I understand that my noble and learned friend LORD THANKERTON,
D who is unable to be here to-day, agrees with the opinion which I have expressed to your Lordships.

LORD WRIGHT: My Lords, the question in this case is whether the respondent is entitled to recover from each appellant the sum of
E £5,000 as moneys due under a commission agreement, or, alternatively, as damages for breach of the agreement. He failed before BRANSON, J., but succeeded on his claim for damages in the Court of Appeal. The action was founded on an agreement for the payment of commissions in respect of the contemplated sale of freehold and leasehold properties
F belonging to the appellants and to a subsidiary company. The decision of the case depends on the terms of the agreement, which in appearance are simple enough, but the questions involved have been complicated by the accumulation of authorities which have helped or hindered courts when deciding disputes in regard to commission agents' agreements.
G In particular, this House has been invited to pronounce on a judgment of the Court of Appeal, *Trollope* (*George*) *&* *Sons* v. *Martyn Bros.* (1), to which I shall refer as *Martyn's* case (1), since followed by the Court of Appeal in *Trollope* (*George*) *&* *Sons* v. *Caplan* (5), to which I shall refer as *Caplan's* case (5). *Martyn's* case (1) has been again discussed in
H *Kahn* v. *Aircraft Industries Corpn., Ltd.* (7), and has finally been applied by BRANSON, J., and the Court of Appeal, though with a difference of result, in the present case. It is clear that some difficulty has been experienced in applying the decision in *Martyn's* case (1). It was the decision of a majority of the court, SCRUTTON, L.J., dissenting. In *Caplan's* case (5), GREENE, L.J., expressed the opinion, at p. 401, that the

authorities as to the rights and obligations of house-agents and their clients with regard to such questions are not in a very satisfactory condition, and hoped that the whole position might be one day reviewed by this House. A similar hope was expressed in the present case by DU PARCQ, L.J.

However that may be, what is in question in all these cases is the A
interpretation of a particular contract. I deprecate in general the attempt to enunciate decisions on the construction of agreements as if they embodied rules of law. To some extent decisions on one contract may help by way of analogy and illustration in the decision of another contract, but, however similar the contracts may appear, the decision as B
to each must depend on the consideration of the language of the particular contract, read in the light of the material circumstances of the parties in view of which the contract is made. I shall, therefore, in the first instance, examine the particular contract in question in the light of the material facts. I shall later touch on certain of the authorities which have C
been debated before your Lordships. It is important to simplify as far as possible the problem of construing commission agency agreements, especially in regard to the sale of houses and land. These are of common occurrence among all classes of the community, and it is most undesirable that subtleties and complications of interpretation calculated to lead to D
disputes should be allowed to confuse what is *ex facie* a plain and simple agreement.

Your Lordships are already possessed of the facts in detail. I may therefore state those which seem to me to be essential as briefly as possible. The appellants Luxor (Eastbourne), Ltd., owned the freehold of the E
Luxor Cinema at Eastbourne. The appellants Regal (Hastings), Ltd., owned the freehold of the Regal Cinema at Hastings. There were also two other cinemas in Hastings, the Elite and the de Luxe. To acquire the leases of these two cinemas a subsidiary company, called Hastings Amalgamated Cinemas, Ltd., was formed by the appellants Regal (Has- F
tings), Ltd. This company in fact acquired the leases on Oct. 7, 1935. The boards of directors of the two appellant companies were formed by the same individuals. Walter Bentley was managing director of both companies, and held a majority of shares in the Luxor and a large percentage of the shares in the Regal. He died on Sept. 11, 1935, but, G
shortly before his death, he had taken steps with a view to disposing of the cinemas. The respondent, who described himself as an insurance and finance broker, was acquainted with W. F. Ewbank, the auditor of the two appellant companies, who introduced him to Garton, the solicitor of the appellant companies. He had stated that he had a friend who H
might be a purchaser of the properties. About the latter part of September, he had an interview with Garton at which Ewbank was present. His account of what occurred was that he told Garton that he had a friend who was prepared to negotiate. The price was discussed, and he told Garton that he expected to get a commission. Garton said that the

lowest price which the appellants would take was £175,000, and that any commission which the respondent got would have to be added to the price. The amount of the commission which the respondent said he required was £10,000. Garton replied that, so long as the purchasers did not object, he did not mind. A little later, the respondent saw Garton again, and asked him to let him have a commission note. Garton said that he would do so, but that he would like to consult the directors before he actually sent the commission letter or note. The commission note was to be made out to the respondent, but the commission was to include everybody. In fact, the respondent had agreed with Ewbank to share it with him in the proportion of 60 to 40. The respondent's friend was Colonel Burton, chairman of the London and Southern Super Cinemas, Ltd. On Oct. 2, 1935, Ewbank sent on to Garton a letter from Colonel Burton on behalf of his company containing an acceptance, with certain variations, of an offer which Garton said that he was authorised by the chairman of the two appellant companies to make. Colonel Burton's offer was for £185,000 for the properties, divided as £97,500 for the Hastings properties and £87,500 for the Eastbourne property. The offers were to be interdependent. It is important to note that it was all "subject to contract." Ewbank's letter to Garton enclosing Colonel Burton's offers stated that the offers were subject to his clients (the appellants) confirming to Norman Cooper (the respondent) the agreed procuration fee—namely £5,000 to be paid by each of the vendor companies, making a total of £10,000. The letter concluded: "The payments to be made on the completion of the purchases."

On Oct. 8, 1935, Garton and Co. wrote to Colonel Burton's company accepting their offer, "subject to contract." On Oct. 11, 1935, Garton and Co. wrote to Ewbank confirming that, "on completion of the sale" of the properties to the London and Southern Super Cinemas, Ltd., the procuration fee of £10,000 was to be paid to the respondent, being £5,000 in respect of each of the two freehold cinemas. Whether these letters or either of them were written by Garton and Co. with the appellant companies' authority has been the subject of debate. It would be outside the apparent authority of the appellant companies' solicitors to bind the companies by these letters. Actual authority would need to be shown. As to the letter purporting to accept the offer of purchase, there is, in my opinion, no evidence of actual authority. That, however, is not material in this appeal, since no contract was ever agreed, and the stage of negotiation was never passed. As to the letter confirming the commission to the respondent, the courts below have held that it bound the companies. No minutes of the directors of either company recording any resolution in confirmation of the commission letter has been produced. On the other hand, there is evidence which may be regarded as sufficient to show that the directors ratified the commission agreement. I accordingly do not differ from the conclusion of the courts below that the commission agreement bound the appellant companies. However, on

Oct. 2, 1935, solicitors representing the late Walter Bentley's interests had written to each of the directors protesting against the proposed sale of the properties, and threatening an application to the court unless an assurance was given that these proposals would not be acted upon. About the same time, proposals were made from another quarter for the sale by the directors and the majority shareholders of their shares to a A
different company, Union Cinemas, Ltd., on the basis of £175,000 as the price for the whole of the shares, without any commission. On or about Oct. 24, 1935, an arrangement was concluded between the appellant companies and the Union Cinemas, Ltd., on this basis. Thus, the negotiation with the purchasers introduced by the respondent never B
resulted in a contract, and no sale was ever completed with, or payment made by, the London and Southern Super Cinemas, Ltd. The courts below held that this company was ready to buy, and was able to arrange finance. The Court of Appeal held that the respondent could not claim payment of the £10,000, or rather the two sums of £5,000 each, because C
the right to payment did not accrue until completion, but that, as the respondent had proved complete performance on his part, he was entitled to claim damages. Scott, L.J., thus sums up his opinion at p. 419:

> . . . if he [the respondent] had performed his part, and if the true reason why the sale D
> fell through was the unwillingness of the boards of the defendant companies to carry out the deal, then there came into operation the implied promise of the defendant companies to do nothing to prevent the deal going through, so as to prevent the plaintiff from earning his commission after he had done all he had promised to do.

This implied promise was, however, subject to the proviso that the companies should have no just cause or reasonable excuse for their conduct. E
He held that the respondent was accordingly entitled to damages from the appellant companies, because they showed no just cause or reasonable excuse. In this conclusion, with which the other members of the Court of Appeal substantially agreed, he followed and applied the decision in *Martyn's* case (1). The court held in effect that, as the appellant companies had, in the circumstances stated, changed their mind, it could F
not be said that, in "preventing" the payment of commission, they had a just cause or reasonable excuse within the ruling of *Martyn's* case (1). Branson, J., had held that certain proceedings of the directors in regard to the shares in the subsidiary company, Hastings Amalgamated Cinemas, G
Ltd., together with the solicitor's letter threatening an application to the court, constituted a reasonable excuse or just cause for abandoning the negotiations with Colonel Burton, and on that ground dismissed the claim. I need not decide between these conflicting opinions, because, as I proceed to explain, I do not accept that this contract was subject to any such H
implied term as the court below have held, and on that ground alone the action, in my opinion, fails.

The respondent, in his statement of claim, does not allege that the letters of Oct. 2, 1935, and Oct. 11, 1935, embody the agreement, but claims on an oral agreement said to have been made at the end of Sept., 1935, by the respondent, in the presence of Ewbank, and by Garton, representing the appellant companies, that the respondent should

> . . . in the event of his finding a suitable purchaser for the four theatres at a price of not less than £185,000 receive commission of £5,000 from each of the appellant companies, making £10,000 in all.

The evidence of the respondent set out above does not precisely bear out this allegation. In particular, there is in that evidence no splitting up of the £10,000 between the two appellant companies, nor any reference to the time at, or condition on, which the commission was to be payable, unless that is to be inferred from the term that it was to be added to the price. Ewbank's evidence as to the oral interviews does not carry the matter any further. Nevertheless, the evidence is clear that a commission note was contemplated and asked for. In my opinion, the intention was that that note should reduce the agreement, or at least the essential terms, into writing. This would be in accordance with the usual course of business, especially where the contemplated commission is large. The agent naturally, in cases of this type, wants some written acknowledgment of his right to commission, something in the nature of a document of title. It is not necessary to consider whether the letters which I think constituted the commission note did or did not contain the whole of the contract. In my opinion, they contained all the terms material to this dispute, and, in so far as they contained these terms, should be regarded as embodying the contract. Ewbank's letter of Oct. 2, 1935, obviously presupposed some arrangement or contract. It was on that footing that he sent on Colonel Burton's offer, and, as well as sending on the offer, actually disclosed his client's name. Though Colonel Burton's company was at all times willing to purchase the properties, if contracts were arranged and exchanged, and was financially able to complete, the essential term in the commission letters was "on completion of the sale." That may be represented in the respondent's evidence of the oral agreement by the term that the £10,000 would have to be added to the price paid by the purchasers, and from this the inference might be drawn that the £10,000 not so far split up was only to be paid on payment of the price. There is nothing unusual in an agreement that commission is to be payable out of the purchase price when received by the vendors, but the expression used in the letters, "on completion of the sale," is, I imagine, the more normal formula, and was obviously, in this case, chosen by the parties as the precise expression of their agreement. The two expressions may be for practical purposes the same, though not technically identical. I shall, however, treat the agreement here as being for payment on completion of the sale. In any event, the agreement contained not merely the stipulation of a point of time at which, but the expression of a condition on which, the payment was to become due. The respondent had, in pursuance of his undertaking, introduced the prospective or potential purchaser. Substantially, the consideration emanating from him had been executed. However, the reciprocal consideration on the part of the appellant companies was in the future. Their promise was only to pay on completion of the sale, and thus the promise only took effect on the happening of that event. I think that all the courts below have accepted this construction of the contract. The claim pleaded was that a vested right to payment of commission arose when an able and willing purchaser was introduced. At a certain stage of the argument before the House, counsel for the respondent advanced that contention, according to which the date of completion was merely a point of time for paying the commission, so that, on failure of completion, commission was payable within a reasonable time. However, it has long since been held that, at least *prima facie*, such words in a commission agreement state the event on which, as a condition, the right to payment accrues to the agent and the obligation to pay attaches to the principal. I think that that is the correct construction of the agreement in this case. That condition was never fulfilled, so that the right to be paid never materialised. The question, then, is whether a term is to be implied, as held by SCOTT, L.J., on the basis of the authority of *Martyn's* case (1). I shall here state at once that, notwithstanding the great respect which I feel for the two Lords Justices who formed the majority in *Martyn's* case (1), I prefer the reasoning of SCRUTTON, L.J., in his dissenting judgment. The hesitation I have felt in differing from the two Lords Justices has made me examine the whole question at perhaps undue length. Before I examine the authorities, I shall attempt to state from an analysis of the agreement now before the House why I am of opinion that the particular term should not be implied.

The expression " implied term " is used in different senses. Sometimes it denotes some term which does not depend on the actual intention of the parties but on a rule of law, such as the terms, warranties or conditions which, if not expressly excluded, the law imports, as, for instance, under the Sale of Goods Act and the Marine Insurance Act. The law also, in some circumstances, implies that a contract is to be dissolved if there is a vital change of conditions. However, a case like the present is different, because what it is sought to imply is based on an intention imputed to the parties from their actual circumstances. There have been several general statements by high authorities on the power of the court to imply particular terms in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. It is well-recognised, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that " it goes without saying," some term not expressed, but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable

principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties. These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts.
A However, language is imperfect, and there may be, as it were, obvious interstices in what is expressed which have to be filled up. Is there, then, any reason in the present case for thinking that there is some defect in expression, or something omitted because it seemed too obvious to express ? I cannot find any such reason.

B There is no indication in the oral evidence that the parties contemplated that the agents should have any right to be paid anything, except out of a purchase price paid by the purchasers to the vendors, still less is there any such indication in the letters of Oct. 2, 1935, and Oct. 11, 1935. I think, indeed, that the language excludes the suggested implication.
C The two letters deal with an offer from Colonel Burton which is "subject to contract." That phrase is sharply contrasted with the phrase "completion of the purchase." These latter words assume at least that the stage of negotiations indicated by "subject to contract" has been successfully passed. During that stage, each negotiating party is free,
D as between himself and the other, to change his mind and desist from negotiating. In particular, the vendor retains the right which belongs to him as property-owner to dispose of his property as he thinks fit. There is no obligation between him and the potential purchaser, assuming —what is not here in question—that he has given no binding option.
E He may, as between himself and the other party, discontinue the negotiations for any reason or want of reason, however capricious or selfish. It is said, however, that, as between himself and the agent, the position is different. There is a binding contract with the agent, and at least an inchoate right to commission in the agent, who, in a case like the
F present, may have done everything on his part requisite to earn his commission. Even so, however, his contract is in terms that his right to commission should depend on a particular event—namely, the completion of the sale. His claim, when the sale is not completed, involves the contention that the principal, in virtue of the contract with the com-
G mission agent, has surrendered the freedom to dispose of or retain his own property which he unquestionably enjoys *vis-à-vis* the other negotiating party. The commission agreement is, however, subordinate to the contemplated principal agreement of sale. It would be strange if what was preliminary or accessory should control the freedom of action of
H the principal in regard to the main transaction which everyone contemplates might never materialise. I cannot think that a property-owner can be held, in virtue of a commission contract like this, to have bound himself by mere implication to complete the sale or pay damages to the agent. Express words are, in my opinion, necessary to effect this result. Indeed, the stipulation "payment on completion of purchase"

is, in my opinion, contradictory to the implication that there is to be payment, even in the shape of damages, in the event of the sale not being completed.

The case that the suggested term is not properly to be implied becomes, in my opinion, even clearer when account is taken of some of the more general aspects of the course of business in these matters. It is well known that, in the ordinary course, a property-owner intending to sell may put his property on the books of several estate agents, with each of whom he makes a contract for payment of commission on a sale. If he effects a sale to the client introduced by one, is he to be liable in damages to all the others for preventing them from earning their commission? Common sense and ordinary business understanding clearly give a negative answer. Alternatively, suppose that, having employed one agent, whose client has made an offer, he receives a better offer from a buyer introduced by another agent, and concludes the purchase with him, it seems out of the question that he is hereby rendering himself liable in damages to the former agent. Again, suppose that, owing to changed circumstances, he decides that he will not sell at all, and breaks off negotiations with the agent's client, is he to be liable for damages to the agent? I can find no justification for such a view. I am assuming a commission contract not containing special terms such as to impose an obligation on the vendor actually to sell through the particular agent to the potential purchaser introduced by that agent. Contracts containing such terms, though not, perhaps, usual, are possible. However, it is said that, in the absence of special terms, an obligation of that nature can be implied, subject, however, to the qualification that the owner retains his freedom to deal as he likes with his own and to discontinue negotiations only so long as, in doing so, he acts with reasonable excuse or just cause. I find it impossible to define these terms in this connection. If the commission agent has a right to claim commission or damages if the vendor abandons the negotiations and does not complete the sale, his doing so is a breach of contract *vis-à-vis* the agent, and it is immaterial to the agent how sensible or reasonable the vendor's conduct may be from his own point of view. Such a qualified implication seems to me too complicated and artificial. The parties cannot properly be supposed to have intended it, nor can it be taken to be necessary to give business efficacy to the transaction. However, I do not discuss this aspect further, because, as already explained, I find no basis for the implication, whether general or qualified. Moreover, the great difficulty which the courts have found in defining or applying the idea of "just cause or reasonable excuse" further goes to show that it is not an implied term necessary to give business efficacy to what the parties must have intended. Nor is the suggested implication made more plausible by expressing it in a negative form as an implied term that the principal will not prevent the agent from earning his commission. Such a term must be based upon something which, under the contract, the principal has agreed to do, of such a nature that failure to do it carries the consequence that the agent cannot earn the commission which would have become due if the principal had done what he promised. For the purposes of the present problem, this promise must be that he would complete the contract. Thus, it all comes back to the same issue—namely, that there must be some breach of contract for which damages can be claimed. It has been said in some cases that the claim may be based on *quantum meruit*, on the principles expounded in the notes to *Cutter* v. *Powell* (8) in Smith's Leading Cases, according to which the special contract is treated as rescinded, and the agent thereupon becomes entitled to claim a partial recompense for what he has done. Such a claim is in the nature of a quasi-contractual claim. It is properly made in cases of contracts for work and labour and the like, where the employer, who has got the benefit of part performance, but before full completion, has repudiated the contract, may be sued either for damages for breach or for restitution in respect of the value of the part performance which he has received. Such cases are, however, obviously different from the present case. The man who engages a plumber to do some work to his house to be paid for by a lump sum thereby promises, *inter alia*, to give the plumber the necessary facilities to do the work, so far as rests on him. That is the employer's part necessarily involved in the engagement. In the case of the commission agent, to whom payment is dependent on completion or the like condition, the principal does not promise that he will complete the contract, for reasons which I have explained. His only promise is that he will pay commission if the contract is completed. There is no promise to pay a reasonable remuneration if the principal revokes the authority to the agent. Moreover, it is a further objection to a claim on a *quantum meruit* that the employer has not obtained any benefit. The agent has earned nothing until the event materialises. It may seem hard that an agent who has introduced a potential purchaser, able and willing to complete, should get nothing for what he has done if during the negotiations the principal decides not to complete, according to his own pleasure, and without any reason which, *quoad* the agent, is a sufficient excuse, but such is the express contract, and people in ordinary life do not seek the services of commission agents without a good prospect and intention of making use of them. The agent in practice takes what is a business risk. I am assuming that the commission contract is of the type exemplified in this case. The agent may, however, secure a form of contract to which what I have said does not apply. However, it is necessary to reserve certain eventualities in which an agent may be entitled to damages where there is a failure to complete even under a contract like the one in this case. For instance, if the negotiations between the vendor and the purchaser have been duly concluded and a binding executory agreement has been achieved, different considerations may arise. The vendor is then no longer free to dispose of his property. Though the sale is not completed, the property in equity has passed from him to the purchaser. If he refused to complete, he would be guilty of a breach of agreement *vis-à-vis* the purchaser. I think, as at present advised, that it ought then to be held that he is also in breach of his contract with the commission agent—that is, of some term which can properly be implied. However, that question and possibly some other questions do not arise in this case, and may be reserved. Furthermore, I have been dealing with a contract in regard to the sale of real property, and there may be differences where the commission agency is in regard to transactions of a different character. On the whole, however, my opinion is that the contract in question means what it says, that the simple construction is the true construction, and that there is no justification for the equitable reconstruction which the Court of Appeal, following authorities which bound it, has applied. I would allow the appeal.

So far, I have proceeded in what I regard as the true effect of the language of the contract, read in the light of the material facts. However, I must refer to some at least of the more or less relevant cases decided before *Martyn's* case (1), and also and in particular to that case itself. In *Simpson* v. *Lamb* (9), the plaintiffs, who were clerical agents, were employed by the defendant to offer an advowson for sale on the terms that, in the event of a sale being effected through their agency, the defendant would pay them a commission of 5 per cent. on the amount of the purchase money, the price authorised being £15,000. The defendant, after the plaintiffs had taken certain steps to effect a sale, informed them that he had sold the advowson himself in another quarter. The plaintiffs claimed that the defendant had wrongfully revoked his authority to them to sell, which they would have done but for the wrongful revocation. At the trial, CRESSWELL, J., nonsuited the plaintiff. He thought that the defendant was perfectly entitled to sell the living himself, that it was fair to presume that the large amount of commission was taken in successful cases as a sort of compensation for the risk incurred, that the plaintiffs could not recover anything unless they sold, and that there was no wrongful revocation of the authority to sell. A rule *nisi* for a new trial was discharged by the Court of Common Pleas, JERVIS, C.J., observing in his judgment that the case was like the case of [p. 616:]

> . . . the house-agent or the shipbroker—the plaintiffs undertaking the business upon an understanding that they were to have nothing if they did not sell the advowson, taking the chance of the large remuneration they would have received if they had succeeded in obtaining a purchaser.

During the argument, CRESSWELL, J., observed that there was no evidence of any contract to pay a reasonable compensation if the authority to sell was revoked.

It has been held that the employment of an agent on the term that his commission is to be payable on results does not, in general, and apart from special terms, deprive the employer of his freedom to dispose of his property or discontinue his business, simply because, by his exercising that freedom, the agent cannot get commission. In *Rhodes* v. *Forwood* (10), the employment of a sole agent to sell the principal's coal in a certain place for a certain time was held by this House not to involve an implied condition that the business should continue to be carried on during the period named or at the place named. LORD CAIRNS, L.C., observed that there was no express contract that the colliery-owner, the employer, would send coal to Liverpool, which was the named place. He examined the contract in detail to ascertain whether there was any such implied term. On this examination, he rejected the idea that the colliery-owner meant to tie his hands for 7 years—the specified period—against selling the colliery either without obtaining the consent of the agent or without paying him a gross sum in compensation. It all depended on the construction of the contract. On the other hand, in *Turner* v. *Goldsmith* (11), the Court of Appeal held that under the contract in its express terms, no term could be implied that the agreement was conditional on the continuation by the defendant of his business. The defendant was there invoking the implied term to relieve him of the effect of his express contract to employ the agent for the specified term. Again, the decision depended on an analysis of the contract. A similar decision was reached in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (12). SCRUTTON, L.J., in the course of his judgment, said, at p. 605:

> The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in a business sense to give efficacy to the contract: that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear." Unless the court comes to such conclusion as that, it ought not to imply a term which the parties have not expressed.

In *French (L.) & Co.* v. *Leeston Shipping Co.* (13), this House refused to imply, in favour of a shipbroker who had procured a charterparty for a specified period under which he was entitled to $2\frac{1}{2}$ per cent. commission on hire paid and earned under it, a term that the shipowner would not, during the charter period, terminate the charterparty by selling the vessel. LORD BUCKMASTER observed that the contract worked perfectly well without any such term being implied. LORD SUMNER said that, in order to succeed, the brokers must show that there has been [p. 456]:

> . . . a breach by the defendants of some obligation in his favour to be implied from the charter. That obligation virtually is that the shipowner will not sell his own ship during the chartered term. [He rejected the idea.] No authority has been produced for the implication of such a stipulation.

These cases no doubt deal with a different type of commission agency, but they illustrate how essential it is to examine the express terms of the contract, and how difficult it is to imply in these cases a term restricting, in the interests of the agent, the freedom of a principal to deal with his own property or business according to his own judgment. In *Bentall, Horsley & Baldry* v. *Vicary* (2), MCCARDIE, J., held that the appointment by a property-owner of estate agents as sole agents for the sale of the property on the terms that, if they introduced a purchaser, they should receive a commission of 5 per cent. on the purchase price did not debar the owner from himself negotiating and effecting a sale to a third person apart from the agents' intervention. As McCardie, J., said, at p. 258:

> . . . the contract contains no express words at all indicating a prohibition against a sale by the defendants himself. If the parties intended such a prohibition, nothing would have been easier than to insert the appropriate words.

In *Martyn's* case (1), all the Lords Justices approved this decision, which, to my mind, is correct. In *Howard-Houlder & Partners, Ltd.* v. *Manx Isles S.S. Co.* (14), McCardie, J., had dealt with a case in which a shipbroker had effected a charterparty which contained an option to the charterer to purchase the ship for £125,000, and entitled the broker to commission on that sum should the option be exercised. The option was not exercised, but, the market having fallen, shipowners and charterers agreed, by a new agreement with which the brokers had nothing to do, that the vessel should be sold to the charterers for £65,000. McCardie, J., held—rightly, as I think—that the brokers could not claim their commission either on the £65,000 or on a *quantum meruit.* He said, at pp. 113, 114:

> It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers. If not, he fails. There appears to be no half-way house and it matters not that the plaintiff proves expenditure of time money and skill.

He quoted a number of cases in support of that proposition which would apply equally to an oral agreement.

I ought to refer to two cases in the Court of Common Pleas which have been cited in support of the respondent's claims. The first is *Prickett* v. *Badger* (6). That case is said to establish a general proposition that, where an agent is employed at an agreed commission to sell land and succeeds in finding a person able and willing to purchase at the stipulated price, but the employer declines to sell and rescinds the agent's authority, the latter is entitled to sue on a *quantum meruit* for his work and labour, on the ground that the performance of the contract was prevented by the wrongful act of the defendant. I presume that the contract makes sale a condition of the agent's right to payment. This statement obviously presupposes that, under the contract betweeen the agent and the principal, the latter had bound himself to sell to the purchaser found by the agent. That this is so seems to follow from the citation by the court of *Planché* v. *Colburn* (15), where the plaintiff had been employed to write a treatise for periodical publication, but the defendant had abandoned the project and had repudiated the contract, so that the plaintiff was entitled to claim damages or to claim on a *quantum meruit.* In *Prickett's* case (6), it is not easy to find out what the contract was. It was oral, but Williams, J., states the agent's obligation to have been to find a purchaser—presumably a person able and willing to purchase at the price named—which he did. If that was all, and if there was no condition that there should be an actual purchase, it would seem to follow that the plaintiff was entitled to get the whole agreed commission. However, he only claimed for work and labour and on an account stated. The jury gave him £50 against his claim for £143 5s. The defendant appealed, on the ground that the plaintiff could not resort to the common courts for work and labour, but could only claim on the special contract, which the defendant contended was that he was to receive commission if he succeeded in effecting a sale, but, if not, was to get nothing. The court rejected this contention, Williams, J., saying that the plaintiff had actually found a person who was willing to become a purchaser at a price exceeding the price demanded, and was only prevented from carrying out the negotiations because of the defendant's inability to convey. The defendant's appeal was dismissed, but a new trial was ordered in favour of the plaintiff, on the ground that the damages awarded were inadequate. Williams, J., is careful to say that in the ordinary case an agent seeking to rely on a *quantum meruit* would be met by what he calls :

> . . . the implied understanding that the agent is only to receive a commission if he succeeds in effecting a sale, but if not then he is to get nothing.

I think that it would be dangerous to treat this decision as laying down any general principle, and certainly not the wide rule which, as I have stated above, it was contended was embodied in it. I treat it as a decision on its special facts, and on the manner in which the plaintiff had formulated his claim.

A later case cited was *Inchbald* v. *Western Neilgherry Coffee, Tea & Cinchona Plantation Co., Ltd.* (4). In that case, the plaintiff, a member of the Stock Exchange, had been appointed as stockbroker to the defendant company to sell their shares, on the terms that he was to receive £100 down and £400 more on the allotment of the whole of the shares of the company. The company had been formed to purchase a tea estate, but it later appeared that the owner of the estate refused to sell. The directors then decided to wind up the company. At that time, all the shares had not been allotted. No one could say that the directors were acting improperly in winding up the company. It was held, however, that the plaintiff was entitled to recover the £400, less an allowance for the risk. I cannot understand this decision, except on the ground that the case was treated as analogous to a case of wrongful dismissal. This would presuppose that the plaintiff was employed to sell all the shares, and that the company engaged that he should do so. Willes, J., said that the company was bound to fulfil its engagement in substance. He instanced the case in Bulstrode of a person who sold a horse but poisoned him before delivery. There was clearly in that case a breach of contract. Willes, J., went on to say, at p. 741 :

> I apprehend that wherever money is to be paid by one man to another upon a given event, the party on whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or make it less probable that he should receive it.

No one, I imagine, would deny that this statement is too wide unless WILLES, J., is referring to prevention by an act which is a breach of the contract between the parties. That would be the case if there was a positive engagement of the plaintiff to sell all the shares, in which event the case would be analogous to *Turner* v. *Goldsmith* (11), and others. I cannot attribute to so accurate a judge as WILLES, J., any such general A
meaning as has sometimes been attributed to his words. BYLES, J., thus sums up the position :

> They [the directors] have broken their contract and the plaintiff must be compensated for it.

When a defendant is charged by a plaintiff with having prevented the B
plaintiff from fulfilling a condition on which his right to payment depends, it must, in my opinion, be shown that the defendant's act which prevented was wrongful. The wrong would be generally a breach of the contract. Thus, in *Mackay* v. *Dick* (3), the maker of an excavating machine was required by the contract to send the machine for the purpose of being C
tested to the railway cutting which the buyer was engaged in constructing, and the buyer was only to be liable to pay for it if it there, in working, satisfied the test. This House held that the buyers had prevented fulfilment of the condition because they held that, it being the buyers' duty under the contract to provide the necessary facilities, they had failed D
to do so. Hence their default prevented the seller from satisfying the condition. The seller could therefore say that he had done all that lay on him to fulfil the condition and was to be taken to have implemented it. The test was only not satisfied because of the buyers' default. Thus, when it is said in the present case that the appellants prevented the E
respondents from completing the contract, it must be shown that the appellants broke some term of the contract between them and the respondents. The appellants cannot be held liable on the ground of prevention where all that happened was that they did, or omitted to do, something which, as between themselves or the respondent, they were free to do F
or to omit to do. I question if there is any exception to this principle, but I am clear that there is no exception material to this case. Since, in my opinion, there was no such implied term as the respondent claims, there can be no case of prevention rendering the appellants liable. G

I have emphasised this matter because I think my divergence from the view of the majority in *Martyn's* case (1) in substance depends on my inability to agree with them that there was the implied term which they introduced into the contract, and upon which they held that there was a prevention by the appellants of the completion of the contract. The H
somewhat elaborate exposition which I have made of my views on the whole topic relieves me from repeating why, with the utmost deference, I have felt constrained to differ from their decision in *Martyn's* case (1). On the other hand, SCRUTTON, L.J., in his dissenting judgment, with which I agree, rejected the implied term, and held that there was no

wrongful act of the employer which prevented the condition of completion being fulfilled. I take it that Scrutton, L.J., meant an act which was wrongful under the contract between the appellants and the respondents. There could be no wrongful act as between the employer and the prospective purchaser in breaking off the negotiations while they were going on "subject to contract," and no wrongful act thereby, in my opinion, as between the appellants and the respondent, for the reasons I have attempted to state. It may well be, as I have already stated, that, as soon as a binding executory contract is effected between the employer and the purchaser, a different state of things arises. The property is transferred in equity, and the seller can be specifically ordered to complete. The agent may then fairly claim that he is entitled to his commission, or at least to substantial damages, and, as at present advised, I think that a term of that nature may be implied in the contract. It cannot have been contemplated that, when a binding contract with the purchaser has been made on the agent's mediation, the principal can, as between himself and the agent, break that contract without breaking his contract with the agent. I understand that this was the view of Scrutton, L.J., and, though the question does not arise in this case, I am, as at present advised, in agreement with it. In that case, it may fairly be said that the employer prevented the fulfilment of the condition, and was in default under the commission agreement just as much as under the agreement of sale. While the matter is still in negotiation, however, it is a different matter.

It may be said that, on the view of Scrutton, L.J., and on the view which I have been propounding, the prospect of the agent getting his reward is speculative, and may be defeated by the arbitrary will of the principal. That may perhaps be so in some cases, but it is clear, I think, that, under a contract like the present, the agent takes a risk in several respects. Thus, for instance, the principal may sell independently of the agent to a purchaser other than the purchaser introduced by him, or, where the employment is not as sole agent, he may sell through another agent. Why should not the agent take the chance also of the employer changing his mind and deciding not to sell at all? It is said that, according to the term which it is suggested should be implied, he can change his mind if he has a reasonable cause or just excuse, but then why should his freedom to dispose of his property be fettered even in this way? Moreover, what is a reasonable excuse or just cause? Is it to be decided from the point of view of the owner or from the point of view of the commission agent? It is just the difficulty of applying these vague phrases which has already led to so much litigation on this question. In my opinion, the implied term is unworkable. Even in this case, Branson, J., has taken one view and the Court of Appeal another. If the suggested implied term is discarded, a contract such as the present will be simple and workable. Commission agents may sometimes fail to get the commission they expect, but they will be relieved from disputes and litigation, and they can always, if they desire, demand what they consider a more favourable form of contract.

I have not referred to all the cases which have been cited to your Lordships. Many are ill-reported. Many reports are deficient in stating the essential factor, which is the exact language of the contract. They are sufficiently discussed in the judgment of SCRUTTON, L.J., whose statement of their effect I substantially accept. On the whole, perhaps, they support his view. They give, on the whole, little guidance on matters of principle. The two decisions in the Court of Appeal which intervened between *Martyn's* case (1) and the present appeal follow *Martyn's* case (1), and are occupied with the question of what constitutes just cause or reasonable excuse in the particular cases. For all these reasons, I concur in the motion proposed by my noble and learned friend VISCOUNT SIMON, L.C.

LORD ROMER: My Lords, the respondent's claim in this case must necessarily be based upon the oral agreement which was come to between himself and Garton on Sept. 23, 1935, for there is no trace to be found of any other agreement between the parties, the letter of Oct. 11 from Garton's firm to Ewbank not purporting to be anything more than a confirmation of the oral agreement already arrived at. It is, to say the least of it, very doubtful whether Garton had any authority to make the agreement on behalf of the appellant companies, but I am willing, for the purposes of this appeal, to assume that he had, or that the agreement was subsequently ratified by them. What, then, were its terms ? The evidence upon this question is meagre and unsatisfactory. The agreement was made at an interview on Sept. 23, at which Garton, the respondent and Ewbank were present. According to Ewbank, all that took place was that Cooper told Garton that he wanted a commission of £10,000 and that Garton agreed to the figure. The respondent in his evidence was a little more explicit. His account of the interview was as follows :

> I told Garton that I had a friend who was prepared to negotiate and we discussed the price, and I told him I expected to get a commission. He told me the lowest price that they would take, and any commission I got would have to be added to that price. The price he gave me was £175,000. I said I was going to add £10,000 to it. He said : "As long as the purchasers do not object, I do not mind."

Garton was not called. It will be observed that neither Ewbank nor the respondent states in terms what was agreed as to the time when, and the event in which, the commission was to become payable, but the letter from Garton and Co. to Ewbank on Oct. 11 confirming the terms of the oral agreement makes it clear that it was a term of such agreement that the commission was only payable upon completion of the sale of the four cinemas to the persons introduced by the respondent, and was to be paid by the appellant companies in equal shares. It would seem, therefore, that the agreement come to was that, if the respondent should introduce some person or persons who should purchase the cinemas for a price not less than £185,000, the respondent should be paid out of the purchase money on completion a commission of £5,000 by each of the appellant companies.

Such being the agreement entered into between the parties, it is plain that the appellants committed no breach of its express terms when they broke off the negotiations with the company introduced by or through the respondent as the proposed purchasers of the four cinemas. The sale to them of the cinemas never materialised, and the agreed commission never became payable to the respondent. This, indeed, is admitted by the respondent. What he does contend is that, in breaking off the negotiations, the appellants committed a breach of an implied condition of the agreement. Counsel for the respondent seemed, I thought, to find some difficulty in formulating the exact terms of this implied condition, but eventually he pinned his faith to the principle of law set out in para. 2 of the respondent's printed case, a proposition which is there alleged to have been established by the decision of the Court of Appeal in *Trollope* (*George*) *& Sons* v. *Martyn Bros.* (1).

> Where an owner of property employs an agent to find a purchaser, it is an implied term of the contract of agency that after the agent has introduced a ready and willing purchaser at a price nominated by or assented to by the principal the principal shall not exercise his right as far as the intending purchaser is concerned to refuse to continue with the negotiation or to complete the sale without " just excuse " or " reasonable cause."

In point of fact, *Martyn's* case (1) did not go so far as indicated in this proposition. In that case the intending purchaser was not only ready and willing to pay the price stipulated for by the vendors, but he was also ready and willing to sign a contract that contained substantially all the terms and conditions which the vendors desired. However this may be, it is plain that the present case does not come within the principle so formulated. The respondent was not employed by the appellants to find a purchaser. He was not employed to do anything at all, and would have committed no breach of his agreement with the appellants had he remained entirely inactive. There was no " contract of agency." If A and B agree that B shall do some work for A for reward, it is no doubt an implied condition of the agreement that A shall not prevent B from performing his part of the contract—*i.e.*, doing the work and so earning his reward—but I can see no ground whatsoever for implying any such condition where B is under no contractual obligation to do the work, but has merely been promised by A a reward in the event of his doing it. If B is under no obligation to do the work, why should A be under an implied obligation not to prevent his doing it? In a case of this sort, B will lose the reward should he fail, for any reason, to do the work. It is the risk which he runs, and which he must be taken as being willing to run. I can find no reason for thinking that in such a case it matters in the least whether B's failure to do the work is due to his own volition or to some act on the part of A, and I may here observe that in *Martyn's* case (1) the plaintiffs had been " instructed " by the defendants to find a purchaser for the defendants' property. This appears from the statement of facts set out in the report, at p. 437. It also appears from the judgments of GREER and MAUGHAM, L.JJ. The former, at p. 446, described the plaintiffs' claim as being one for commission arising by reason of their "employment" by the defendants as their agents for sale of the property there in question. The latter, at p. 453, referred to the plaintiffs as having been "employed" by the defendants.

Supposing, however, that a contract by one person to pay another a sum of money in the event of the latter performing an unsolicited service to the former is as much subject to an implied condition as if the latter had been employed to perform the service, the condition is in general one that merely imposes on the former a negative, and not a positive, obligation. If I employ a man for reward to build a house on my land, I subject myself to an implied condition that I will do nothing to prevent his carrying out the work, but I am under no implied obligation to help him earn the reward, whether by the supply of building materials or otherwise. However, there are exceptional cases, where, in a contract of employment, the employer is under a positive obligation. If, for instance, I employ an artist to paint my portrait, I subject myself to the positive obligation of giving him the requisite sittings. The question, then, to be determined upon the hypothesis which I mentioned just now is this. Where an owner of property employs an agent to find a purchaser, which must mean at least a person who enters into a binding contract to purchase, is it an implied term of the contract of agency that, after the agent has introduced a person who is ready, willing and able to purchase at a price assented to by the principal, the principal shall enter into a contract with that person to sell at the agreed price, subject only to the qualification that he may refuse to do so if he has just cause or reasonable excuse for his refusal? This qualification must plainly be added, for the respondent does not contend, and no one could successfully contend, that the obligation of the principal to enter into a contract is an unconditional one. In my opinion, the question must be answered in the negative. Any such implied condition would be either wholly unreasonable or it would be void for uncertainty. If it means that the employer is to enter into a contract on such terms as the purchaser may require, it is obviously unreasonable. If it means that the contract is to contain such terms as to commencement of title, date of completion, requisitions, restrictive covenants and so forth as may be just and reasonable, it is void for uncertainty, for who can possibly judge what, in such a case, is just and reasonable as between the employer and the agent? It is the position as it affects the agent which would have to be considered. Nothing for which the vendor might stipulate as to the terms of the contract could be considered unjust or unreasonable as between him and the purchaser. Take the present case. The offer of the proposed purchaser introduced by the respondent purports to have been accepted by the directors of the appellant companies at a board meeting held on Oct. 2, 1935. As all the directors were personally interested in the matter, the resolution passed was a nullity. However, even if it bound the appellants, the acceptance of the offer resolved upon was an acceptance "subject to contract."

The object of inserting these words in an acceptance is well-known. It is to save the vendors from being bound by an "open contract," and leaves them at liberty to insist on such terms being embodied in the contract as they may think right. If the respondent's contention be right, however, the appellants were under an implied obligation to insert only such terms as might eventually be held by some unspecified tribunal to be just and reasonable as between them and the respondent. The contention, I confess, appears to me to be utterly absurd. My Lords, it must not be thought that in saying this I am guilty of any disrespect to the judges who formed the majority of the court in *Martyn's* case (1). What they actually decided was that, inasmuch as the agents had introduced a person who was prepared, not only to purchase at the price stipulated for by the vendors, but to enter into a contract containing substantially every term and condition which they required, the vendors were, unless they could show some just and reasonable cause for not doing so, under an implied obligation to sign that contract, and so enable the agents to earn the agreed commission. Whether that case was rightly decided or not is a question which I do not find it necessary to determine. It is sufficient to say that it does not cover the present one. Nor, in truth, did it cover the subsequent case of *Trollope (George) & Sons* v. *Caplan* (5), a case which, in my opinion, was wrongly decided.

It only remains to say a few words about *Prickett* v. *Badger* (6), on which the respondent placed much reliance. In that case, the defendant had employed the plaintiff to find a purchaser for some land. The plaintiff thereupon prepared a plan of the land, issued advertisements, and wrote letters to, and had personal interviews with, a number of people. Eventually he found a person who was ready, willing and able to buy the land. The defendant then disclosed for the first time the fact that he had no title to the land. Pollock, C.B., directed the jury that, in those circumstances, the plaintiff was entitled to be paid by the defendant a reasonable remuneration for his services—in other words, a *quantum meruit*. On appeal, it was held that the direction was right. Crowden, J., said that a contract was implied by law to pay the plaintiff a reasonable remuneration for his labour, and Miller, J., agreed. The case is no authority in support of the respondent's claim in the present case, even if, in view of later decisions, it is to be regarded as good law.

In my opinion, for the reasons which I have given, this appeal should be allowed, and I concur in the motion now before your Lordships' House.

Appeal allowed.

Solicitors: *H. S. Wright & Webb* (for the appellants); *Mayo, Elder & Co.* (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Distinguished. TURBURVILLE *v.* WEST
HAM CORPN. [1950] 2 All E.R. 54.

Dictum of VISCOUNT MAUGHAM, a
p. 76, *applied.* FIRESTONE TIR
AND RUBBER CO. (S.S.), LTD.
SINGAPORE HARBOUR BOARD. [195
2 All E.R. 219.

GRIFFITHS & ANOTHER *v.* SMITH

[HOUSE OF LORDS (Viscount Simon, L.C., Viscount Maugham, Lord Wright, Lord Romer and Lord Porter), **September 17, 18, December 12, 1940].**

Education — Non-provided school — Repair — Liability — Managers — Public authority—Public Authorities Protection Act, 1893, (*c.* 61), *s.* 1—*Education Act,* 1921 (*c.* 51), *ss.* 29-35.

The appellant's son was, at the material time, a pupil of a non-provided school. The female appellant was invited to attend an exhibition of the pupil's work. The invitation was issued by the headmaster and was issued with the authority of the managers of the school, the respondents. The female appellant attended, and was injured through the collapse of a floor due to want of repair. In an action for damages in respect of the injuries received, it was contended that the respondent managers were in occupation only as agents of the general committee of the Liverpool Church of England Schools' Society, also respondents, and also that, in holding the gathering in question, the respondent managers were not acting in pursuance of any public duty or in execution of any Act of Parliament, but were performing a purely voluntary act :—

HELD : (i) the managers were a public authority within the protection of the Public Authorities Protection Act, 1893.

(ii) the action of the managers in authorising the invitation was not a voluntary act, but was one done in the direct discharge of a public duty—namely, that of carrying on the school to the best advantage.

Decision of the Court of Appeal ([1939] 2 All E.R. 76) *affirmed.*

[EDITORIAL NOTE — In these proceedings, in which the same decision has been reached in all courts, the position of the school managers of a non-provided school has been fully considered. The question was whether they were entitled to the protection of the Public Authorities Protection Act, 1893. It was contended, in the first place, that they were not a public authority, and, in the second place, that the act which led to the injury was not one which was essential to the carrying on of the school, though it was one which they were permitted to do. It is settled now that such managers are a public authority, and that they are still performing part of their public duty in arranging and carrying through exhibitions of work, prize distributions and similar gatherings of the parents and pupils. These gatherings must be directly connected with the scholastic work of the school, and it may well be that a different conclusion would be reached in the case of a sale of work or a bazaar held for the general purpose of augmenting the funds of the church to which the school is attached. In the course of their opinions, their Lordships have approved the decision in *Greenwood* v. *Atherton* (8).

AS TO PUBLIC AUTHORITIES PROTECTION ACT, 1893, see HALSBURY, Hailsham Edn., Vol. 26, pp. 290-297, paras. 609-616 ; and FOR CASES, see DIGEST, Vol. 38, pp. 101-112, Nos. 725-795.]

Cases referred to :

(1) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274 ; 36 Digest 35, *208* ; 35 L.J.C.P. 184 ; 14 L.T. 484 ; *affd.* (1867), L.R. 2 C.P. 311.

(2) *Tierney* v. *Smith* (1936), Unreported, Feb. 20.

(3) *Bradford Corpn.* v. *Myers,* [1916] 1 A.C. 242 ; 38 Digest 110, *784* ; 85 L.J.K.B. 146 ; 114 L.T. 83 ; *affg.,* [1915] 1 K.B. 417.

(4) *A.-G.* v. *Margate Pier and Harbour Co of Proprietors,* [1900] 1 Ch. 749 ; 38 Digest 102, *734* ; 69 L.J.Ch. 331 ; 82 L.T. 448.

(5) *Ayr* v. *St. Andrews Ambulance Assocn.,* [1918] S.C. 158 ; 38 Digest 125, case *p.*

(6) *Mitchell* v. *Aberdeen Insurance Committee,* [1918] S.C. 415 ; 38 Digest 115, case *825 vi.*

(7) *Paul (R. & W.), Ltd.,* v. *Wheat Commission,* [1937], A.C. 139 ; [1936] 2 All E.R. 1243 ; Digest Supp. ; 105 L.J.K.B. 563 ; 155 L.T. 305.
(8) *Greenwood* v. *Atherton,* [1939] 1 K.B. 388 ; [1938] 4 All E.R. 686 ; Digest Supp. ; 108 L.J.K.B. 165 ; 160 L.T. 37.
(9) *Harnett* v. *Fisher,* [1927] A.C. 573 ; Digest Supp. ; 96 L.J.K.B. 856 ; 137 L.T. 602.
(10) *Fielden* v. *Morley Corpn.,* [1900] A.C. 133 ; 38 Digest 120, *864* ; 69 L.J.Ch. 314 ; 82 L.T. 29.
(11) *The Ydun,* [1899] P. 236 ; 38 Digest 102, *732* ; 81 L.T. 10 ; *affd.,* [1899] P. 342.
(12) *Lyles* v. *Southend-on-Sea Corpn.,* [1905] 2 K.B. 1 ; 38 Digest 102, *733* ; 74 L.J.K.B. 484 ; 92 L.T. 568.
(13) *Sharpington* v. *Fulham Guardians,* [1904] 2 Ch. 449 ; 38 Digest 109, *783* ; 73 L.J.Ch. 777 ; 91 L.T. 739.
(14) *Graigola Merthyr Co., Ltd.* v. *Swansea Corpn.,* [1929] A.C. 344 ; 38 Digest 113, *804* ; 98 L.J.Ch. 233 ; 140 L.T. 505.
(15) *The Johannesburg,* [1907] P. 65 ; 38 Digest 103, *738* ; 76 L.J.P. 67 ; 96 L.T. 464.
(16) *Williams* v. *Mersey Docks and Harbour Board,* [1905] 1 K.B. 804 ; 36 Digest 131, *870* ; 74 L.J.K.B. 481 ; 92 L.T. 444.
(17) *Weir* v. *Thomas & Abson* (1914), 79 J.P. 54 ; 38 Digest 106, *758*.
(18) *Freeborn* v. *Leeming,* [1926] 1 K.B. 160 ; 38 Digest 130, *955* ; 95 L.J.K.B. 114 ; 134 L.T. 117.
(19) *Venn* v. *Tedesco,* [1926] 2 K.B. 227 ; 36 Digest 131, *871* ; 95 L.J.K.B. 866 ; 135 L.T. 108.
(20) *Nelson* v. *Cookson,* [1940] 1 K.B. 100 ; [1939] 4 All E.R. 30 ; Digest Supp. ; 109 L.J.K.B. 154 ; 161 L.T. 346.
(21) *Clarke* v. *Bethnal Green Borough Council,* [1939], 2 All E.R. 54 ; Digest Supp. ; 160 L.T. 292.
(22) *Edwards* v. *Metropolitan Water Board,* [1922] 1 K.B. 291 ; 38 Digest 111, *795* ; 91 L.J.K.B. 210 ; 126 L.T. 300.
(23) *Fairman* v. *Perpetual Investment Building Society,* [1923] A.C. 74 ; 36 Digest 37, *213* ; 92 L.J.K.B. 50 ; 128 L.T. 386.
(24) *Gillow* v. *Durham County Council,* [1913] A.C. 54 ; 19 Digest 560, *32* ; 82 L.J.K.B. 206 ; 107 L.T. 689.
(25) *Blencowe* v. *Northamptonshire County Council,* [1907] 1 Ch. 504 ; 19 Digest 560, *35* ; 76 L.J.Ch. 276 ; 96 L.T. 385.
(26) *Jeremiah Ambler & Sons, Ltd.,* v. *Bradford Corpn.,* [1902] 2 Ch. 585 ; 38 Digest 102, *736* ; 71 L.J.Ch. 744 ; 87 L.T. 217.
(27) *Edwards* v. *St. Mary, Islington, Vestry* (1889), 22 Q.B.D. 338 ; 38 Digest 107, *765* ; 58 L.J.Q.B. 165 ; 60 L.T. 725.
(28) *Hawkes* v. *Torquay Corpn.,* [1938] 4 All E.R. 16 ; Digest Supp.
(29) *Clarke* v. *St. Helen's Borough Council* [1915), 85 L.J.K.B. 17 ; 38 Digest 111, *794* ; 113 L.T. 681.
(30) *Palmer* v. *Grand Junction Ry. Co.* (1839) 4 M. &. W. 749 ; 38 Digest 110, *789* ; 8 L.J. Ex. 129.

APPEAL by the plaintiffs in the King's Bench Division, who were the appellants in the Court of Appeal from a judgment of the Court of Appeal, dated Mar. 8, 1939, and reported *sub nom. Griffiths* v. *St. Clements's School, Liverpool (Managers), and Liverpool Church of England Schools Society (Trustees),* [1939] 2 All E.R. 76, affirming a judgment of TUCKER, J., dated July 1, 1938, and reported [1938] 3 All E.R. 537. The action was brought in the first place by 29 plaintiffs, but by agreement the case of one plaintiff was taken as a test case. The facts and arguments are fully set out in the opinion of VISCOUNT SIMON, L.C.

Wilfrid Clothier, K.C., and *M. Turner-Samuels*, for the appellants, the plaintiffs in the action.

Basil Nield for the first respondents, the school managers.

A. T. Miller, K.C., and *S. Scholefield Allen* (for *Selwyn Lloyd* on war service) for the respondent Liverpool Church of England Schools Society.

Viscount Simon, L.C. : My Lords, this is an appeal from the Court of Appeal (Sir Wilfrid Greene, M.R., MacKinnon and Finlay, L.JJ.), affirming a judgment of Tucker, J., at Liverpool Assizes, in favour of the respondents. The first five respondents are the managers of a publc elementary school in Liverpool known as St. Clement's Church of England School, and were the principal defendants in an action brought by the appellants, Mr. and Mrs. Griffiths, for damages in respect of personal injuries sustained by the last-named when upon the school premises, owing to a shocking accident which occurred on the evening of Dec. 12, 1934. Mrs. Griffiths, whose son was a pupil at the school, was one of those invited by the headmaster, with the authority of the managers to attend an exhibition on the premises of work done by the boys. There were also to be songs during the evening which the pupils had learned while attending the school. While this display was going on, the first floor of the school premises collapsed. Many persons, including Mrs. Griffiths, suffered serious injuries, and two persons were killed. There is no dispute that the floor was in a dangerous condition. The school building was nearly 100 years old. The method of support of the floor was quite obsolete. The defects in the structure were obvious to inspection. There had been no survey of the building for 30 years prior to the accident. Tucker, J., found as a fact that those who were charged with the duty of keeping the premises in repair had not taken reasonable care to discharge that duty. This view of the matter has not, I think, been challenged in any stage of the litigation, and, on the undisputed evidence, no other view is possible.

The duty of keeping the schoolhouse in good repair rests upon the managers (Education Act, 1921, s. 29 (2) (*d*)). This duty they are to discharge " out of funds provided by them." That is to say, they have no call upon public funds for the purpose. The sources to be drawn upon are, in practice, voluntary subscriptions or donations, and, in some cases, trust funds or endowments. This provision was originally enacted in the Education Act, 1902, s. 7 (1) (*d*), but the Act of 1902 was repealed by the Act of 1921, which reproduced in substance the contents of the earlier Act. The Education Act, 1902, effected a compromise under which " non-provided " schools (which at an earlier stage were commonly known as " voluntary " schools) were maintained and kept efficient by the local education authorities, and thus indirectly receive the support of local rates for that purpose, on the condition that the managers of a non-provided school (sect. 7 (1) (*d*)) :

> . . . shall provide the school house free of any charge, except for the teacher, dwelling house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the school house in good

> repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority: Provided that such damage as the local authority consider to be due to fair wear and tear in the use of any room in the school house for the purpose of a public elementary school shall be made good by the local education authority. . . .

It is the provision and maintenance by the managers of the school fabric A in good repair which is the *quid pro quo* for the advantages conferred on non-provided schools by the scheme of the Act, with the result that the managers have extensive powers in the appointing and dismissing of teachers and religious instruction may be given in accordance with the provisions of any trust deed relating to the school. It cannot be too B clearly understood that the managers of a non-provided school are not entitled to claim that it should be maintained by the local education authority as a public elementary school, unless they perform their part of the statutory bargain and keep the schoolhouse in good repair. The statute, as I have already observed, says that the managers are to do C this "out of funds provided by them," and the explanation of the deplorable condition of these school premises is that sufficient funds were not forthcoming from private sources to do the necessary repairs. In such a case, the managers should exercise their powers to bring the school to an end: see the Education Act, 1921, ss. 38, 40. They have no D right to attempt to carry on the school when the premises are in a condition which is dangerous to the safety of children and teachers, and it is no excuse for doing so to say that adequate funds were not forthcoming.

The body of managers constituted for a non-provided public elementary school is the creation of the statute and the statutory provision is now E to be found in the Education Act, 1921, s. 30 (2). That section provides that not more than four of them shall be "foundation managers," appointed under the provisions of the trust deed of the school, or under an order made in pursuance of the Education Acts. To these are to be added further managers, not exceeding two in number, in the case of F Liverpool, by the local education authority. To the managers thus appointed of a non-provided school is entrusted the management of the school in all matters not expressly reserved to the local education authority. This statutory body of managers, charged with these important functions is, therefore, quite distinct from any general managerial body which may G have been constituted or contemplated by the trust deed under which the school came into existence. These latter have for practical purposes disappeared, and the new statutory body is the only body with authority to manage the school.

Counsel for the appellants put their claim on the basis that the managers H had invited Mrs. Griffiths to come upon premises which the managers occupied and controlled without warning her of their dangerous condition and without putting them in a proper state of repair. So stated, the claim is to enforce a common law liability which is generally illustrated by referring to the decision given more than 70 years ago by the Court of Exchequer Chamber in the leading case of *Indermaur* v. *Dames*

(1). Tucker, J., found this claim proved, citing, in support of the view that the managers must for this purpose be regarded as occupiers, an unreported decision of Singleton, J., in *Tierney* v. *Smith* (2), which dealt with injuries sustained by another plaintiff arising out of the same accident. The Court of Appeal took the same view, and, apart from the defence raised under the Public Authorities Protection Act, 1893, both the courts below would have decided in favour of the present appellants. I entirely concur, and entertain no doubt that, if Mr. and Mrs. Griffiths had issued their writ more promptly, they would have had an effective cause of action against the managers — she on account of the injuries she sustained owing to their breach of duty, and he because of the resulting loss of his wife's services while she was incapacitated. However, the writ was issued on Oct. 12, 1936, 22 months after the accident, and the managers thus have the opportunity of pleading that they were protected by the Public Authorities Protection Act, 1893. The sole question in the appeal is whether this plea should prevail.

The Public Authorities Protection Act, 1893, s. 1 (now in substance reproduced, with the substitution of 12 months for 6 months, in the Limitation Act, 1939), begins as follows :

> Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provision shall have effect : (*a*) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within 6 months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof. . . .

No case was made at the trial that the injury, which began on Dec. 12, 1934, continued to within 6 months of the date of the writ, and accordingly the managers must be regarded as relieved from any legal responsibility if the Act can be prayed in aid in the circumstances of the present case.

The scope of application of the Public Authorities Protection Act, 1893, has been the subject of many decisions, and the question was considered by your Lordships' House in *Bradford Corpn.* v. *Myers* (3), where some of the earlier cases were in effect approved. I have had the advantage of reading the opinion about to be delivered by my noble and learned friend Viscount Maugham, and am glad to adopt his review of these previous decisions. The opinion of Lord Haldane in *Bradford Corpn.* v. *Myers* (3) contained a warning that it might be difficult to extract from the words of the Act a comprehensive principle which would serve as a complete guide for the future. Lord Haldane said, at pp. 250, 251 :

> In such a case, the court can only take the particular facts in the case before it, and decide as best it can whether they come within the words, or they fall altogether outside them. The essentially negative method of the second alternative often renders it, where it applies, the easiest and the safest one to use, and sometimes it admits of a principle of exclusion being laid down where no principle can be formulated affirmatively with any confidence in its legitimacy.

One difficulty in determining the exact scope of the Act has arisen from the circumstance that its first and main section is so widely drawn as to suggest that the protection which it affords is available to " any person " for any act done by him in intended execution of any Act of Parliament, or in pursuance of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority. There is, however, a considerable body of case law to the effect that the Act (as its short title indicates) does not apply to protect defendants who are not, in some sense, " public authorities," even though they are acting under statutory powers. This view is affirmed by LORD BUCKMASTER, L.C., in *Bradford Corpn.* v. *Myers* (3), where he says, at p. 247 :

> . . . " any person " must be limited so as to apply only to public authorities.

On this point the construction of the Act should be regarded as finally settled.

There is, however, a second question connected with the construction of the Act on which it is difficult to reach precision. Assuming that the " person " is a public authority in the sense required, what kind of action by the public authority is to be regarded as satisfying the conditions of the section that the act must be " done in pursuance, or execution, or intended execution of any Act of Parliament or any public duty or authority," or that the neglect or default must be " in the execution of any such Act, duty, or authority " ? In one sense everything which is done by a public authority within the limits of their statutory powers might be regarded as done in execution of the statute. Even if a public corporation exist independently of statute, all their actions within their powers might perhaps be regarded as done in execution of their public authority. However, this House has decided in *Bradford Corpn.* v. *Myers* (3) that the statute ought not to be given so wide a construction. LORD BUCKMASTER, L.C., said, at p. 247 :

> . . . it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority.

In *Bradford Corpn.* v. *Myers* (3), the corporation had power to carry on a gas undertaking, and were bound to supply gas to the inhabitants of the district. In addition they had statutory authority (which they were not, however, bound to exercise) to sell the coke produced in the manufacture of the gas. They did so, and a cart-load of coke, in the course of being delivered to a particular purchaser, was negligently shot through his window. This House held that the Public Authorities Protection Act, 1893, did not apply, because the act of contracting to sell the coke to the purchaser and of supplying it was purely voluntary. SIR WILFRID GREENE, M.R., in the present case, explains the decision in *Bradford Corpn.* v. *Myers* (3) by saying, at p. 83 :

> . . . what they were doing in supplying the coke was not something incidental to, or part of, the process of carrying on the gas undertaking and supplying the gas compulsorily to the inhabitants. It was something that lay outside that altogether.

There are thus two questions to be decided as to the application of the

Public Authorities Protection Act, 1893, in the present case. First, are the managers a public authority ? Secondly, was the neglect or default proved against them neglect or default in the execution of their statutory duty or authority ? In my opinion, both these questions should be answered in the affirmative. As regards the first question, the body of managers are a statutory body created by the Education Acts for the discharge of public duties. They are not analogous to companies acting for profit, as in *A.-G.* v. *Margate Pier & Harbour Co. of Proprietors* (4), nor to voluntary charitable associations, as in *Ayr* v. *St. Andrews Ambulance Assocn.* (5), but rather to the long list of authorities set up by Parliament for carrying out public responsibilities, which have been held protected by the Act, of which insurance committees under the National Health Insurance Acts (*Mitchell* v. *Aberdeen Insurance Committee* (6)) or the Wheat Commission (*Paul* (*R. & W.*), *Ltd.* v. *Wheat Commission* (7)) are useful examples. The Court of Appeal has already held in *Greenwood* v. *Atherton* (8) that the managers of a non-provided school are a public authority within the protection of the Act, and it appears to me that this view is right.

Lastly, was the action of the managers in authorising the invitations to this school display an act done in the execution of their statutory duty or authority ? It was strenuously contended for the appellants that this action was " voluntary " in the sense in which the sale of coke in *Bradford Corpn.* v. *Myers* (3) was voluntary. It is true that St. Clement's school could have been carried on without arranging to hold this display, but that is not the true test. The real question is whether the managers, in authorising the issue of invitations to the display on the school premises after school hours, should be regarded as exercising their function of managing the school. To apply the distinction indicated by SIR WILFRID GREENE, M.R., was the manager's action " something incidental to, and part of the process of carrying on " their statutory duty ? Both the trial judge and the Court of Appeal took the view that in this matter the managers were doing an act which formed part of the operation of carrying on a public elementary school. As SIR WILFRID GREENE, M.R., observed, a gathering such as this is a very familiar type of gathering in schools of all sorts. TUCKER, J., reached his conclusion in a passage which I must quote, at p. 538 :

> In my view, the managers had a material interest in inviting the plaintiff to the premises, in the sense that it was in the inrerests of the prosperity and success of the school to enlist the support and co-operation of the parents of the pupils in the work done at the school. The display in question consisted entirely of an exhibition of the work done by the pupils and of the singing of songs which they had learnt at the school. I accordingly hold that the plaintiff was an invitee and not a mere licensee. I am further of opinion that on the occasion in question the school was being used as a public elementary school, and not for some extraneous purposes unconnected with its functions as a school.

I entirely agree with this view, which has prevailed in both courts below. It would be within the discretion of the managers to decide whether they would approve such a display or whether they would not. The point is, however, that they did approve it, and that they did so in the course of carrying on this public elementary school and of exercising the powers of management conferred upon them by the Education Act. There is, in my opinion, no ground whatever for saying that the invitations issued to this display were issued for some extraneous purpose unconnected with the management of the school. I am of opinion, therefore, that the managers can avail themselves of the protection of the Act. If they are discharged from liability, it is not disputed that the other defendants are also entitled to succeed, and I need not discuss whether in any event they could be held liable. I move that this appeal be dismissed.

Viscount Maugham: My Lords, the facts in this appeal have been sufficiently stated in the opinion of Viscount Simon, L.C., and I need not repeat them. Counsel for the appellants, in presenting the appeal, which he did with great clearness, was faced with the difficulty that he had to deal with two careful judgments, that of Tucker, J., in the trial court, and that of Sir Wilfrid Greene, M.R., in the Court of Appeal (with which MacKinnon and Finlay, L.JJ., agreed). I agree with those judgments, and, except on two points, I do not think I could usefully take up your Lordships' time in expressing in my own language that which has been admirably stated by the judge and by Sir Wilfrid Greene, M.R. The first point is perhaps only a matter of form, but it seems to me worth mentioning in order to prevent possible misconception. It is not quite accurate to say or to imply that the managers of the school under the Education Act, 1921, were liable to repair the school so long as the school was being used as a public elementary school without adding words to show that this liability was to repair "out of funds provided by them" (sect. 29 (2) (*d*)). This does not mean that they must repair at their own expense, but that the funds coming to them as managers from endowments or voluntary contributions or otherwise must be so applied. If they cannot out of funds so provided keep the schoolhouse in such repair that the school can safely and properly be carried on, it would seem clear that they should exercise their powers of closing the school under sec. 40 of the Act, and it will be observed that under sec. 40 (2) the local education authority, if they carry on the school, become subject to an obligation to keep the schoolhouse in repair. No notice was given in the present case under sec. 40. These remarks, however, have no application to the action so far as it is based on the allegation of failure of duty towards the appellant as an invitee, and it is to be noted that in the Court of Appeal and in this House, counsel for the appellant made it clear that it was only on that ground that he was seeking to obtain judgment for his client. The other point on which I shall venture to make some remarks which may perhaps be useful is that which arises on the Public Authorities Protection Act, 1893. Sect. 1 of this Act has now been replaced by the Limitation Act, 1939, which extends the period of limitation from 6 months to one year (sect. 21) and makes a special provision for disability (sect. 22 (*g*)), but in other respects the language of sect. 1 of the Act of 1893 is reproduced, so that the difficult questions of construction which constantly arose under that Act will continue to arise except in so far as they have been settled by authority.

The question on the present appeal is whether the managers of a non-provided school can rely on the Act of 1893 as a defence to an action by the appellant, who was an invitee to the school premises on an occasion when the floor collapsed and thus caused her serious injury. I have nothing to add to what my noble and learned friend VISCOUNT SIMON, L.C., has already said as regards the occasion itself. It was in fact an exhibition of work done by the pupils and a performance of songs which they had learnt at the school. It was held by TUCKER, J., that this was a use for the purposes of a public elementary school. The Court of Appeal agreed with this crucial finding of fact, and I do not think that any of your Lordships felt any doubt that that finding was justified. The appellant had to show that the managers were in occupation and control of the premises, and were, therefore, under a common law duty to the invitee to take reasonable care to prevent injury to the latter from a hidden danger of which, as occupiers, they should have been aware, or to warn the invitee of the existence of the danger. Thus the claim is simply on the well-known principle of *Indermaur* v. *Dames* (1).

My Lords, for the present purpose, we must assume that the appellant is rightly asserting that the managers were in occupation of the school premises so that the principle applies, and I will add that, for my part, as at present advised, I think that the contention was justified. This point was so decided by SINGLETON, J., in the similar case of *Tierney* v. *Smith* (2), cited with approval by TUCKER, J., in the present case. The questions, therefore, for decision on this appeal as regards the claim against the managers may be stated thus. (1) Were the managers a public authority within the scope or ambit of the Public Authorities Protection Act, 1893 ? (2) Was the act of the managers in inviting the appellant to come to the school premises on the occasion in question an act done in pursuance or execution, or intended execution of any Act of Parliament, or of any public duty or authority (Public Authorities Protection Act, 1893, s. 1) ? Since the decision of this House in *Bradford Corpn.* v. *Myers* (3) it has been clear that the Act must be limited so as to apply only to a definite class of persons and to a definite class of action : per LORD BUCKMASTER, L.C., at p. 247. In effect, the class of persons is that of public authorities. This result follows from a consideration of the introductory words in sect. 1, from the short title to the Act, and from an examination of the nature of the 108 enactments specified in the schedule, which were repealed to the extent mentioned in the schedule and superseded or replaced with modifications by the Act. This House, however, took the view, often before expressed, that the Act was not intended to cover every act which a public authority might have the power to perform. *Bradford Corpn.* v. *Myers* (3) related to a municipal corporation authorised by statute to carry on the undertaking of a gas company and bound to supply gas to the inhabitants of the district. It was also empowered to sell the coke necessarily produced in the manufacture of the gas. This House held that the corporation was not entitled to rely upon the Act of 1893 as a defence to an action for negligence A brought by a purchaser of coke from the corporation. The coke, it should be added, was shot by their agent through the purchaser's shop window, but the action was not commenced within six months after this untoward event. The ground of the decision as given by LORD BUCKMASTER, L.C., was that the negligence was not in performance of B "the direct execution of a statue, or in the discharge of public duty, or in the exercise of a public authority," and he added that he meant a duty owed "to all the public alike or an authority exercised impartially with regard to all the public." An incidental power to trade with the public was not, he said, within this qualification. With variations of C language, I think the other learned and noble Lords agreed. LORD DUNEDIN stated that he was in entire agreement with the opinion of LORD BUCKMASTER, L.C., and LORD ATKINSON in the later case of *Harnett* v. *Fisher* (9) cited the material passages from the opinion with obvious approval.

D My Lords, the decision may be more easily understood if it is realised that, if the argument for the corporation had prevailed, it would seem to follow that the Act would apply for the benefit of every public authority if it could be shown that the act done or intended to be done was *intra vires* the authority. Thus, every contract entered into for the purpose E of carrying out any such act, however unwise and whatever the neglect or default of the public authority in carrying out the contract, would have the protection of the Act of 1893. Moreover, such a view would have involved the overruling of a number of decisions, including earlier cases of high authority decided before the passing of the Act of 1893 F relating to similar conditions contained in other Acts of Parliament. It is, therefore, not surpising that this House dismissed the appeal in *Bradford Corpn.* v. *Myers* (3), though it should be pointed out that the majority declined to accept as a satisfactory and sufficient ground for the decision the argument that the action was one for breach of contract, G which in some previous cases had been treated as a sufficient ground for holding that the Act did not apply.

My Lords, both LORD BUCKMASTER, L.C., and LORD HALDANE pointed out that the Act was so framed that it did not seem possible to draw a clear line between cases which fell within the Act and those which H did not, or to lay down any exact principle, and this view has, I think' been accepted in all subsequent decisions. It seems, however, that some of the previous cases were accepted as having been correctly decided—in particular *Fielden* v. *Morley Corpn.* (10), *The Ydun* (11) and *Lyles* v. *Southend-on-Sea Corpn.* (12)—whilst, on the other hand, *Sharpington* v. *Fulham Guardians* (13) met with some criticism. I will say a word as to the first three of these cases. In *Fielden* v. *Morley Corpn.* (10), there was no duty on the corporation to make the aqueduct which overflowed. There was only a power to make it. Yet the Act was held to apply. The case went to the House of Lords, but only on the question of solicitor and client costs, and it does not seem to have been argued here. It was, however, approved by Lord Buckmaster, L.C., in *Bradford Corpn.* v. *Myers* (3), at p. 249, and I think by the other noble and learned Lords. In *The Ydun* (11), the Act was held to apply to an action for negligence by a harbour authority in inviting a barque to come up the River Ribble to the port and harbour of Preston at a time when there was not sufficient water in the channel leading to the docks. It was held by the Court of Appeal that the corporation was acting, or purporting to act, in pursuance of its public duty as the authority for the port and harbour (which included the River Ribble up to the dock), and that this was sufficient to entitle it to the benefit of the Act of 1893. In *Lyles* v. *Southend-on-Sea Corpn.* (12), the negligence alleged was in the working by the corporation of an electric tramway under a power conferred by an order in pursuance of the Light Railways Act, 1896. The passenger had paid his fare, obtained his ticket, and taken his place, and there was, therefore, an implied contract by the corporation to carry him with reasonable care, but nevertheless the corporation was held by the Court of Appeal to be entitled to the statutory defence, because the action was in substance founded on a breach by the defendants of their duty under the Light Railways Order.

My Lords, since the decision of this House in *Bradford Corpn.* v. *Myers* (3), and the tacit or express approval of the cases to which I have referred, it has been impossible to doubt (if it was doubtful before) that it is not essential that a public authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge, or attempted discharge, of a positive duty imposed on the public authority. It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade. The words in the section are "public duty or authority," and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation. The same view is, I think, implicit in the decision of this House in *Paul (R. & W.), Ltd.* v. *Wheat Commission* (7). There is another decision of this House which may usefully be referred to. It was held in *Graigola Merthyr Co., Ltd.* v. *Swansea Corpn.* (14) that sect. 1 of the Act of 1893 applied to a *quia timet* action, although the repeated references in the section to an act done and to neglect or default might well point to another conclusion. The judgment in this House was delivered by Lord Buckmaster, L.C., and he declined to treat the matter as one which was free and open for discussion. There were, he said, at p. 349, precedents of very great authority, long standing and uniform, and in such a case, relative to a question of statutory practice, he could not think that it would be right to set those authorities aside. My Lords, these observations apply to some extent to the present appeal, and I do not think any of your Lordships would be disposed to interfere after a good many years with the established current of decisions on questions as to the applicability of the Act of 1893.

That persons in a somewhat similar position to that of the managers in the present case have been treated as a public authority has been decided in numerous cases. The following are examples: river commissioners and harbour boards acting without profit (*The Johannesburg* (15) and *Williams* v. *Mersey Docks and Harbour Board* (16)), all kinds of sanitary, water and tramway authorities, and the officers and servants of such authorities, *e.g.*, medical officers of health, or persons in a like position (*Weir* v. *Thomas & Abson* (17), *Freeborn* v. *Leeming* (18), *Venn* v. *Tedesco* (19), *Nelson* v. *Cookson* (20), and *Clarke* v. *Bethnal Green Borough Council* (21). Unless quite a number of these cases ought to be overruled, I cannot doubt but that the managers in the present case are within the protection of the Act. It seems to me to be clear that in carrying on the school they were carrying out a public duty.

The second question I have formulated above relates to the character of the act of the managers. When the invitations were issued to a number of persons, including the appellant, were the managers doing an act in execution, or purported execution, of a public duty or authority in relation to the school? For the reasons I have given, it is, I think, immaterial that the managers were not bound to invite persons to what was called an " open meeting " to see exhibits of work done by the boys. If that is correct, it seems to me that the express finding of TUCKER, J., that the school on the occasion in question was being used as a public elementary school, and not for some extraneous purpose, is almost conclusive. If, as I think we must assume, the managers thought that the open meeting was in the interests, and for the benefit, of this voluntary school, the act of inviting people to attend was a thing done in direct discharge of a public duty—namely, that of carrying on the school to the best advantage. I am using the adjective " direct " simply as indicating that the duty was cast upon the managers by the mere fact that they were bound to carry on the school as efficiently as possible. This, I think, is using the word in the same sense as that which was attributed to it in *Bradford Corpn.* v. *Myers* (3), and, if so understood, I am quite content to follow the lead of LORD BUCKMASTER, L.C., in his use of the word.

There is strong authority in favour of this view in addition to the cases which this House appears in *Bradford Corpn.* v. *Myers* (3) to have accepted as correct. To give a single additional instance, the well-known case of *Edwards* v. *Metropolitan Water Board* (22) seems to me in point, and it was approved by LORD ATKINSON in this House in *Harnett*

v. *Fisher* (9), at p. 592. In *Edwards'* case (22), the defendants were under a statutory duty to supply water to the inhabitants of a large area, and to maintain water-pipes for that purpose. Repairs to the latter were often needed, and the defendants sent a steam lorry to convey some cast-iron pipes to a district depot and to return bringing back empty casks and drums to the central depot. On the return journey, the driver of the lorry negligently ran over and injured the plaintiff. It was held by BANKES and SCRUTTON, L.JJ., that the Public Authorities Protection Act, 1893, applied. It should be mentioned that YOUNGER, L.J., differed, but he said that, if the accident had taken place on the outward journey of the lorry, he would have held that the Act of 1893 applied. For the present purpose, it is sufficient to point out that the lorry (though there was no positive obligation to send it) was sent out in exercise of a power or of an authority conferred on the defendants, and that the power or authority was being exercised directly for the public benefit. In my opinion, this decision was correct.

My Lords, like the noble and learned Lords who took part in the decision in *Bradford Corpn.* v. *Myers* (3), I must admit the impossibility of drawing a clear line of distinction between the cases, but, following the views expressed by TUCKER, J., and by the Court of Appeal, I have no difficulty in coming to the conclusion, after an examination of, I think, all, or nearly all, the authorities, including those above referred to, that in this case the managers are entitled to the protection of the Public Authorities Protection Act, 1893. For these reasons, which are but supplementary to those given by VISCOUNT SIMON, L.C., I am of opinion that this appeal should be dismissed.

My Lords, my noble and learned friend LORD ROMER, who is unable to be here this afternoon, has asked me to say that he concurs in this motion.

LORD WRIGHT: My Lords, the appellants have failed in the courts below, on the ground that the Public Authorities Protection Act, 1893, applies to their claims and they have not been brought within the period of 6 months fixed by the statute then in force. Even the extended period of limitation, which the Limitation Act, 1939, s. 21, fixed at 12 months, would not have helped them, because they did not bring their action until 22 months after the injury sustained by the female appellant. It is impossible not to sympathise with persons who, having suffered a grave wrong, find their claims defeated in this way, but a definite period of limitation may often involve a serious prejudice in particular cases. All that can be said is that the legislature has fixed the precise period, no doubt for what have seemed to it good reasons.

Margaret Elizabeth Griffiths, the female appellant and principal plaintiff, was very severely injured on the evening of Dec. 12, 1934, when she was attending a display of pupils' work at St. Clement's School in Liverpool, where her son was a pupil. She, along with other parents, had been invited to attend by the headmaster, who issued the invitation with the authority of the first five respondents. They were the school managers, and are herein referred to as the managers. The display consisted entirely in an exhibition of work done by the pupils and in the singing by the pupils of songs which they had learned at the school. It took place on the first floor of the school building. This suddenly collapsed, owing to the scandalously bad state of repair of the building. The floor was in a seriously dangerous condition. The building was about 100 years old, and had not been surveyed for 30 years. Many of the parents suffered serious injuries. This action was in the nature of a test action. On these facts, both TUCKER, J., and the Court of Appeal rightly held that the appellant was, not merely a guest or licensee, but an "invitee," to whom was owed the duty, defined in *Indermaur* v. *Dames* (1), and in *Fairman* v. *Perpetual Investment Building Society* (23). That duty was clearly broken. Indeed, that it was broken was not contested before your Lordships. However, the respondents relied on the Public Authorities Protection Act, 1893, which both courts below have held to be a good defence, on the ground that the school was being used at the time as a public elementary school. In the words of SIR WILFRID GREENE, M.R., at p. 81:

> The managers, in the course of carrying on the public elementary school and exercising the powers of management conferred on them by the Education Act, and not for some extraneous purpose, issue invitations to the appellant and others to come to a building which they are maintaining pursuant to their obligations under the Act and for the purposes of the Act.

Accordingly, the courts below held that the Public Authorities Protection Act, 1893, applied and was a good defence. I agree with this conclusion, but various points have been raised on behalf of the appellants, which I must briefly consider.

There was first a question whether the action was rightly brought against the managers at all, because it was urged that the second set of defendants were the only proper defendants. These were certain members of the General Committee of the Church of England School Society. The third set of defendants were the trustees of the property of the Society. As to them, I need say no more than that they were admittedly bare trustees, and no relief was claimed against them. That the first set of respondents were properly sued is, to my mind, clear, regard being had to the provisions of the Education Act, 1902, now embodied in the Education Act, 1921, which was a consolidating Act. For convenience, I shall refer to the relevant sections of that latter Act which replaced the corresponding sections of the Act of 1902. That Act gave a special status and special rights to the voluntary schools, which were thenceforth called non-provided schools. The school in question belonged to that class. Such schools were called non-provided schools because the local authority did not provide the school buildings or repair them, but the managers bore that responsibility in return for the right of giving such denominational religious instruction as they desired.

Section 29 (*d*) of the Act of 1921 enacted that the managers of the school should provide the schoolhouse free of charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and should out of funds provided by them keep the schoolhouse in good repair, subject to fair wear and tear in specified respects. On the other hand, sect. 29 (2) imposed on the local education authority the obligation to maintain and keep efficient under the Act a public elementary school not provided by them so long as the school was necessary, subject to various conditions set out. The Act gave certain powers and control over the non-provided school to the local authority, which was responsible for all secular education in it. Section 30 (2) provided for the constitution of a body of managers in non-provided public elementary schools, which was to consist of not more than four foundation managers and not more than two managers appointed by the appropriate local authority. Section 35 (2) provided that the managers of an elementary school should have power to fulfil the conditions required to be fulfilled to earn the Parliamentary grant, and to fulfil any other conditions, perform any duties and exercise any powers under the Act, notwithstanding any provision contained in any trust deed of the school. Section 35 (3) provided that the body of managers appointed under the Act for a non-provided school should be the managers of the school, both for the purposes of the Act and so far as respected the management of the school as a public elementary school for the purposes of the trust deed. In s. 170 (10), the expression "managers" in relation to a public elementary school is defined as including all persons who have the management of the school, whether or not the legal interest in the schoolhouse is vested in them. Section 32 provided that the appointment of foundation managers was to be under the trust deed or under an order made under the section, which corresponded to sect. 11 of the Act of 1902. It was under this latter section that an order was made by the Board of Education on Dec. 10, 1903. It provided that the nominating body of the foundation managers should be (so far as material) the General Committee of the Liverpool Church of England Schools Society. The five managers who were made defendants to the writ were duly appointed in accordance with the provisions of the order.

In my opinion, under these provisions there was established a new statutory body of managers, who, in place of the committee of the school society, were to exercise all the powers of management as specified in sect. 35 (3). In this I agree substantially with the opinion of LORD MERSEY in *Gillow* v. *Durham County Council* (24), at pp. 73, 75. It follows, I think, that there was no justification for joining the two members of the general committee of the society, whose functions, so far as relevant to this case, had passed to the managers. It is not suggested that they had anything to do with the issue of the invitation or the holding of the display. They had no responsibility for the management or repair. Whatever powers in this regard they had exercised under the trust deed before 1902 were transferred to the new body of statutory managers, who have superseded them. The courts below rightly dismissed these two respondents from the action.

The provisions of the Education Act which I have quoted show clearly, in my judgment, that the statutory body of managers were within the protection of the Public Authorities Act, 1893, and make it unnecessary to consider the various subtleties and distinctions of interpretation which have at times been raised in regard to the Public Authorities Protection Act. The managers were a statutory organ of a government department, now the Ministry of Education. They were charged by statute with the public duty of managing a public elementary school, and of repairing the school buildings. The claim against them was for a wrongful act committed against the appellants in the course of the statutory duty of managing the school. This case is widely different from such a case as that discussed in *Ayr* v. *St. Andrews Ambulance Assocn.* (5), where it was held that the Public Authorities Protection Act, 1893, did not apply to a voluntary charitable institution, though incorporated by Royal Charter. The words of the statute are satisfied as soon as it is rightly found, as it has been, as already stated, that, on the occasion in question, the school was being used as a public elementary school. There was thus in the words of the Public Authorities Protection Act, 1893, a " neglect or default in the execution of any such Act, duty or authority."

Counsel for the appellants, however, has contended that this is not the true conclusion, on the ground that this was not a default in the execution of a public duty or authority, but simply a breach of a private duty owed to a private person, the female appellant, arising out of a private transaction—namely, the invitation to attend the display. However, this argument, if sound, would apply to almost all, if not all, cases, in which the Public Authorities Protection Act is in practice invoked. The plaintiff in such cases is a private litigant, complaining of a wrong done to him in his private capacity, but, though the wrong is in this sense private, the question is whether it was committed by the defendant in the execution or intended execution of a public duty or authority. As a single illustration of this, I may refer to *The Ydun* (11), where the dock authority successfully relied on the Act against a claim by a shipowner for damages, because the authority had been negligent in inviting the ship to come up the river when there was not sufficient water, so that the ship sustained damage. It was enough that the authority was acting in the execution of a public duty. On this reasoning, this contention of counsel for the appellants fails.

It has also been urged that the issue of the invitation was not an act done in the execution of a statutory duty, because there was nothing in the Education Act which specifically required that to be done. The issue of the invitation was, it was said, purely voluntary. In my opinion, Sir Wilfrid Greene, M.R., sufficiently deals with this argument when he points out that an Act of Parliament does not deal with details of the manner in which its provisions may be carried out. He says, at pp. 82, 83:

> Schools can be carried on in one way or another. There is a multitude of details which can be done in this way or in that way, or perhaps omitted altogether, without the school ceasing to be a public elementary school.

It is enough in this case that it has been found that, in holding the display, the school was being used as a public elementary school. "Management" is a word of wide import. Thus, in *Gillow* v. *Durham County Council* (24), it was held to include the appointment of a school caretaker and cleaner. In *Greenwood* v. *Atherton* (8), it was held to include providing and controlling the school playground, so that the claim of a boy injured through defects in the playground was barred because not brought within the 6 months. No support is afforded to the appellants by the decision in *Bradford Corpn.* v. *Myers* (3). That decision did indeed show that the thing done is not necessarily done in execution of a public duty or authority by a statutory corporation merely because it is *intra vires*. The Bradford municipal corporation, in virtue of various Acts of Parliament, as held by Lord Buckmaster, L.C., were authorised to carry on the undertaking of a gas company. They were in terms bound to supply gas to the inhabitants of the district, and they also had power to sell coke. It was held by this House, that in selling the coke, or, perhaps more accurately, in the process of delivering the coke under a contract of sale, they were not acting in execution of a public duty or authority. Some expressions used in that case were cited as favouring the appellants' arguments in this appeal. *The Ydun* (11) was cited by Lord Buckmaster, L.C., as a sound decision, so that he did not exclude a case from the Public Authorities Protection Act merely because a private person suffered a private wrong. He held that the statute applied if the act was in "direct" execution of a statute, or in the discharge of a public duty or the exercise of a public authority. What "direct" means is, however, often difficult to ascertain. Lord Haldane, who also uses the test of "direct," goes on to say, at p. 251:

> What causes of action fall within these categories it may be very difficult to say abstractly or exhaustively. It is hardly easier to define *a priori* the meaning of being done directly that it is to define the numbers of grains that will make a heap.

However, in the present case, the managers, in issuing the invitation, were, in my opinion, "directly" engaged in the management of the school. I do not think that the difficulty discussed in *Bradford Corpn.* v. *Myers* (3) really arises. Much turned, I think, in that case on the sharp antithesis of two operations, the one to supply gas, which was obligatory on the corporation, and the other to sell coke, which was optional. This made it easier to dissever the two operations, though in one sense both might be regarded as falling within the general idea of a gas company's undertaking, which necessarily involved not merely the making and supply of gas, but the disposal of coke and other residual products. For the purposes of the present case, however, there is no reason to distinguish as optional or obligatory different items which may go to make up the management of the school. What was being done was, in my opinion, clearly done as an item in the management of the school, which was a public duty obligatory on the managers so long as they continued it. It is true that, under the Education Act, 1921, s. 40, managers of a non-provided school may, under certain conditions as to notice, decide to close their school, and in that way relieve themselves of their duties as managers, but that does not affect their position before they retire from their duties, or enable it to be said that their functions were voluntary or optional. It is not here necessary to consider what the position would have been if the accident had occurred when the school was being let to outsiders for use as a bazaar or a political or other meeting, or for other than school purposes. On the whole case, I agree with the decisions of the courts below, and think that the appeal fails, and should be dismissed.

LORD PORTER: My Lords, the appellants in the appeal sued the respondents for damage said to be caused by the negligence of the respondents or some of them towards Mrs. Griffiths. Her husband, John Griffiths, claims for loss of her services, and she claims in respect of her own injuries. The first five respondents are the managers of a non-provided elementary school in Liverpool known as St. Clement's Church of England Schools, the sixth and seventh respondents are two of the members of the General Committee of the Church of England Schools Society. They were sued as representing themselves and all other members of the general committee of that society, but, as no representation order was obtained, it is admitted that they could only be liable, if liable at all, as individuals. The remaining respondents are trustees of the society. No relief is sought against them personally, but they are joined as trustees of the society because it is suggested that recourse to the property of the society by way of execution could only be obtained by making them parties.

St. Clement's School was originally a voluntary school, and was a non-provided school within the meaning of the Education Acts 1902 and 1921. The accident of which complaint is made occurred on Dec. 12, 1934. On that day, Mrs. Griffiths attended the school, of which her son was a pupil. She had been invited to be present at an open evening between 7 p.m. and 8.30 p.m., when there was to be a display of scholars' handiwork and a singing of songs by the scholars. The invitation was signed by the headmaster, and was issued with the approval and authority of the managers of the school. The display took place on the first floor of the building, and, whilst it was in progress, the floor gave way, with the result that two persons were killed and many others, including Mrs. Griffiths, were injured. The judge who tried the case found that the managers were negligent in failing to keep the building in proper repair, and this finding was not controverted either in the Court of Appeal or before your Lordships' House. He also found that Mrs. Griffiths was an invitee, and this, too, was not disputed.

Admitting that there had been negligence in repairing the school building, the question arose who, if anyone, was responsible to Mrs. Griffiths for her injuries, and whether those liable were protected by the Public Authorities Protection Act, 1893. The history of the school may be briefly stated. In 1837 funds were raised and land purchased and conveyed to trustees under a trust deed of Sept., 1837, upon trust to permit and suffer the schools and buildings to be erected thereon to be appropriated and used for the education of the children of the poor in such manner and subject to such rules and regulations in all respects as the general committee for the time being of the Church of England Schools Society should from time to time direct, and so that such buildings, schools and premises should at all times be considered to be, and actually be, in the possession and under the control of the committee for the time being and upon trust to permit and suffer the schools and buildings to be from time to time repaired at the discretion of the committee at the expense of the society. The land upon which St. Clement's School was subsequently built was conveyed, not by this deed, but by deeds of May, 1841, and Sept., 1841, though the trusts were the same as those expressed by the earlier deed, and the rules of that deed applied, and were from time to time amended and added to, as provided by the deed.

At some time before 1875, the school appears to have passed into the control of the incumbent of St. Clement's Church and of those in authority in that church: the phrase used was that it had been "adopted by the congregation." It seems that by 1867 the society adopted the system of making grants to the poorer schools of the city, and has ever since been in practice a schools aid society. To such an extent had the society left the management to the church officials that by 1877 the incumbent was claiming to be owner and refusing to recognise the society or general committee. In that year, however, the society successfully established its ownership, but appears to have acceded to the request of the incumbent and to have left the management in the hands of the congregation. Indeed, from 1878 to 1902, the committee appointed no manager or teacher, and did nothing save make a grant of £50 towards the expenses of the school, and, on two occasions, extra grants towards extraordinary repairs. Upon these facts, Tucker, J., found the evidence insufficient to establish any occupation of the building by the general committee or its agents in 1902. No doubt the activity displayed by the society in 1875 was the result of the changes effected by the passing of the Education Act, 1870, but actually, in a consideration of the present case, that Act is only material because it preserved the position of managers of non-provided schools. A substantial change in their position, however, took place as a result of the Education Act, 1902. I do not think it necessary to consider the provisions of that Act in detail, inasmuch as the position of non-provided schools is now dealt with by the Act of 1921. It is enough to state that the earlier Act substituted certain statutory managers for the managers under the trust deed of non-provided schools, and by sect. 11 (6) made the new body managers both for the purposes of the Elementary Education Acts, including the Act of 1902, and so far as respects the management of the school as a public elementary school for the purpose of the trust deed. The material provisions of the Act of 1921 are contained in the following sections :

> 17 (1) The local education authority for elementary education shall, in accordance with and subject to the provisions of this Act, maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose other than expenditure for which under this part of this Act provision is to be made by the managers. . . .
>
> 27. Every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act ; and every public elementary school shall be conducted in accordance with the following regulations. [The regulations were admittedly complied with in the case of St. Clement's School.]
>
> 29 (2). A local education authority shall maintain and keep efficient under this Act a public elementary school not provided by them only so long as the school is necessary and the following conditions and provisions are complied with . . . (*d*) The managers of the school shall provide the schoolhouse free of any charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the schoolhouse in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority. . . (6) The managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act and shall subject to the powers of the local education authority under this section, have the exclusive power of appointing and dismissing teachers. (7) One of the conditions required to be fulfilled by an elementary school not provided by a local education authority in order to obtain a parliamentary grant shall be that it is maintained under and complies with the provisions of this section . . .
>
> 30 (2). All public elementary schools not provided by the local education authority shall have a body of managers consisting of a number of foundation managers not exceeding four appointed as provided by this Act, together with a number of managers not exceeding two appointed . . .(*b*) where the local education authority are the authority of a borough. . . both by that authority.
>
> 31 (1). The foundation managers of a school shall be managers appointed under the provisions of the trust deed of the school, or under an order made in pursuance of this Act or the Education Act, 1902, s. 11, or under the trust deed of the school as modified by any such order.
>
> 32 (1). If it is shown to the satisfaction of the Board of Education that the provisions of the trust deed of a school not provided by the local education authority as to the appointment of managers are in any respect inconsistent with the provisions of this Act, or insufficient or inapplicable for the purpose, or that there is no such trust deed available, the Board of Education shall, on the application of the local education authority or any other person interested in the management of the school, make an order under this section for the purpose of meeting the case. . . (6) Any order made under this section, where it modifies the trust deed of a school, shall have effect as part of the trust deed . . .
>
> 35 (2). The managers of an elementary school shall have power to fulfil the conditions required to be fulfilled in order to obtain a parliamentary grant, and to fulfil any other conditions, perform any duties, and exercise any powers under this Act, notwithstanding any provision contained in any trust deed of the school. (3). The body of managers appointed under this Act for a public elementary school not provided by the local education authority shall be the managers of the school both for the purposes of this Act, and, so far as respects the management of the school as a public elementary school, for the purposes of the trust deed,

40 (1). The managers of a public elementary school not provided by the local education authority, if they wish to close the school, shall give 18 months' notice to the local education authority of their intention to close the school, and a notice under this provision shall not be withdrawn except with the consent of the local education authority. (2) If the managers of a school who have given such a notice are unable or unwilling to carry on the school up to the expiration of the period specified in the notice, the schoolhouse shall be put at the disposal of the local education authority, if the authority so desire, for the whole or any part of the period, free of charge, for the purposes of a school provided by them, but subject to an obligation on the part of the authority to keep the schoolhouse in repair and to pay any outgoings in respect thereof, and to allow the use of the schoolhouse and the school furniture by the persons who were the managers of the school to the like extent and subject to the like conditions as if the school had continued to be carried on by those managers.

170 (10). The expression "managers" in relation to an elementary school includes all persons who have the management of the school, whether the legal interest in the schoolhouse is or is not vested in them. . .

So far as the action was levelled against the managers, it was admitted by those respondents that they were in control of the school at the material time, and that Mrs. Griffiths had been present at the display by their invitation. For them, the only defence relied upon was the protection said to be afforded by the Local Authroities Protection Act, 1893. The appellants, however, claimed that the General Committee of the Church of England Schools Society were also liable, because, as was asserted, the committee were in control and occupation of St. Clement's School, not only up to 1902, but up to the date of the accident. If the judge's finding of fact has evidence to support it (and I think the evidence ample), his finding is conclusive as regards the period ending in 1902, but the material question is as to the position after that date, and, indeed, as to the position after the passing of the Act of 1921. It is for this reason that I have set out the various sections of that Act.

Both courts which have adjudicated upon the matter have held that, whatever may have been the case before those dates, the result of the Acts of 1902 and 1921 has been to supplant the managers under the trust deed and to put in their place the statutory managers appointed under the Act "so far as respects the management of the school as a public elementary school for the purposes of the trust deed" (sect. 35 (3)).

I am not sure that the appellants controverted this decision, but they maintained that the statutory managers were substituted for those appointed under the trust deed, not for all purposes, but only for the purposes of the Act, and that during the display the school was being used, not for the purposes of the Act, but for the purpose of the trust deed only. That the statutory managers are in sole control at any time at which the school is being used as a public elementary school appears clear from the sections quoted above. Indeed, no interference by any other body during that time could be justified. Under sect. 29 (6), they have all the powers of management required for carrying out the Act—namely, for carrying on the school as an elementary non-provided school. Under sect. 29 (2), they have the obligation to repair, and, under sect. 35 (3), they are the managers as respects the management of the building as a public elementary school. For this purpose, no distinction is drawn between the foundation managers and the appointed managers. Both alike must manage the school whilst used as a public elementary school. Indeed, the provisions of the trust deed as to the appointment of managers and those inconsistent with the conditions prescribed for the receipt of grants out of moneys provided by Parliament may be altered under sect. 32 (2) and 121 of the Act. Moreover, in the present instance, the foundation managers are appointed, not under the trust deed, but under an order of the Board of Education made under sect. 11 of the Act of 1902.

Though no serious controversy arose as to the position and authority of the managers appointed under the Act, it was strenuously contended before your Lordships that the display was no part of the school curriculum, and took place out of school hours. Apart from arguments to be derived from the nature of the performance, it was pointed out that the local education authority had refused to pay for the lighting and heating of the school for the display. Both courts below have decided that the display formed part of the use of the schoolhouse for the purposes of a public elementary school. I think all your Lordships are agreed that such a use cannot be confined to a time when instruction is being given. The due carrying on of an educational establishment entails the holding of prize-giving ceremonies, of concerts and of exhibitions of the pupils' work and skill. To such entertainments parents are rightfully invited. As SIR WILFRID GREENE, M.R., has said in his judgment, at pp. 82, 83:

> There is a multitude of details which can be done in this way or in that way, or perhaps omitted altogether, without the school ceasing to be a public elementary school. A gathering such as this—and it is a very familiar type of gathering in schools of all sorts—is one which is obviously I should have thought—and this view is supported by the finding of the judge—one in the doing of which the managers were performing part of their functions as managers in the conduct of this public elementary school.

It was suggested by the appellants that no change in the position of managers, or at any rate of the foundation managers, had been effected by the provisions of the Acts of 1902 or 1921, and the expressions used by VISCOUNT HALDANE, L.C., in *Gillow* v. *Durham County Council* (24), at p. 65, where he speaks of the "managers who were in existence when the Act began to operate," and of their powers continuing "to include that of general management," and the words of LORD ATKINSON in the same case, were called in aid. I cannot think that these incidental expressions are to be read as determining that the managers appointed under the Act are the successors of managers under the trust deed to the extent that they are to be regarded as agents for the body which controls the school premises under the terms of the deed. All that VISCOUNT HALDANE means is, I think, that they exercise the same functions, but not that they bear the same relationship to the owners or controllers of the building. They are a separate and independent statutory body, who manage and control the premises whilst in use as a public elementary school. I do not think that either of these two noble and learned lords intended to differ from LORD MERSEY, when he says, at p. 73 :

> . . . the effect of the legislation appears to me to be to make the new statutory body of managers the successors of the trustees under the old school deed and to vest in them many of the rights and powers which those trustees previously had.

It is true that in *Blencowe* v. *Northamptonshire County Council* (25), WARRINGTON, J., held that the managers of a non-provided school had A not such a possession of the premises as to entitle them to bring an action for trespass. He says, at p. 527 :

> The effect of those provisions of the Act of 1902 seems to me to be that the Act assumes the provision of the school and says nothing about the ownership; and I think the true conclusion to be drawn from the provisions is that the managers B have merely certain statutory rights over such schoolhouse as is provided by the owner whether under a trust deed or, as in the present case, a private owner . . .

Whether this expression of opinion be accurate or not, it has, I think, little bearing on the present case. The managers have under the Act the right—and, if they exercise that right, the duty—of providing the schoolhouse for use as a public elementary school under sect. 29 (2) (*d*), and C of repairing it. The invitation was issued under their authority, and the use of the building was under their control. At the time when the floor gave way, the owners were not in occupation, nor could they have issued invitations, or interfered with the holding of the display. Nor can any such distinction, as was attempted, be drawn between the foundation and D non-foundation managers, at any rate, whilst they are acting in the management of the school as a public elementary school. All alike are responsible, and in fact in the present case no such distinction has been made. All alike have been sued. The result of these considerations is that the managers appointed under the Act are a new and independent E body, who are in control and occupation of the school during such period as it is in use as a public elementary school, and that the General Committee of the Church of England Schools Society were neither in occupation nor control at the time of the accident. This view is supported by the fact that, according to the evidence, the managers' authority was given F for the sending of the invitations. Having regard to this finding, it is unnecessary to consider what the position of the statutory managers is when the school is being used privately—*e.g.*, as a Sunday school or for a bazaar—a problem, in view of the wording of the Act, of some difficulty.

It being established that the managers invited Mrs. Griffiths to the G display, and were the only persons in occupation and control of the school building when it was held, it has to be determined whether they are liable to her for her injuries. It is true that under sect. 29 (2) (*d*) they are under an obligation to repair, and it was suggested by the H appellants that for breach of that statutory duty they were liable in damages, but, in the first place, the duty of repair was not owed to Mrs. Griffiths, and, in the second place, if that duty is statutory and the managers a public authority, they would be protected against such a liability by the Public Authorities Protection Act, 1893, inasmuch as the action was not commenced within 6 months of the accident. Alternatively,

however, it was said that Mrs. Griffiths was an invitee, that the managers
either were not a public authority, or, if they were, nevertheless their
action in providing the building and managing the school was a voluntary
one, which they might perform in the way in which they did or in some
other way or not at all, and that it was only in respect of compulsory
A duties that the Act applied to protect the public body. A number of
authorities said to support this view were cited to your Lordships, and
particular reliance was placed upon the decision of your Lordships'
House in *Bradford Corpn.* v. *Myers* (3). The short heading and terms of
the Act are as follows :

> B Public Authorities Protection Act, 1893. . .1. Where after the commencement
> of this Act any action. . . is commenced in the United Kingdom against any
> person for any act done in pursuance or execution or intended execution of any
> Act of Parliament or of any public duty or authority, or in respect of any alleged
> neglect or default in the execution of any such Act, the following provisions shall
> have effect, (*a*) the action shall not lie . . . unless it is commenced within 6 months
> next after the act neglect or default complained of. . .

C The wording of the section is in very general terms, but certain limitations
have been placed upon the width of its interpretation by decisions, one
at least of which is binding upon your Lordships' House. In the first
place, though the word " person " is used, not every person is protected.
It is a " Public Authorities Protection Act " and not a " Persons Pro-
D tection Act," and, therefore, the body to be protected must be a public
authority : *Myers* v. *Bradford Corpn.* (3) and *The Johannesburg* (15),
at p. 72. What, then, is a public authority ? As SIR GORELL BARNES,
P., says in *The Johannesburg* (15), the phrase is not confined to municipal
corporations. There are many other bodies which perform statutory
E duties and exercise public functions, and examples of such bodies are
given by him at p. 79. The distinction which he draws is between a
body carrying out transactions for private profit and those working
for the benefit of the public. Profit they may undoubtedly make for
the public benefit (*The Ydun* (11) and *Lyles* v. *Southend-on-Sea Corpn.*
F (12), but they must not be a trading corporation making profits for their
corporators (*A.-G.* v. *Margate Pier & Harbour Co. of Proprietors* (4)).
That the managers of a public elementary school, however, whether
provided or non-provided, are a public authority, I cannot doubt. They
form part of the machinery whereby elementary education is provided for
G in this country, and a school which the managers provide is maintained
and kept efficient by means of public rates, even though the building is
provided and repaired by the managers themselves. In carrying on the
school they are undoubtedly exercising a public function. Perhaps it
is sufficient in this connection to quote the words from sect. 29 (6) :

> H The managers of a school maintained but not provided by the local education
> authority shall have all the powers of management required for the purpose of
> carrying out this Act.

So far as the Court of Appeal is concerned, this matter has already
been determined in *Greenwood* v. *Atherton* (8), with the reasoning in
which in substance I agree, though I doubt whether the fact that the

public authority is acting in pursuance of a private act takes its action out of the category of a public duty. Not only, however, must the "person" be a public authority, but the act done must be done in the execution or intended execution of an Act of Parliament, or of any public duty or authority and the neglect must be a neglect or default in the execution of an Act of Parliament or a public duty or authority. It would, I think, be enough to say in the present case that the managers neglected a duty imposed upon them by Act of Parliament—namely, the duty of repairing the schoolhouse—but I think that the same result follows whether one regards them as neglectful of an Act of Parliament or of a public duty or authority.

It was argued on behalf of the appellants that the duty neglected was not a public duty because the managers need not have provided the school at all or might have withdrawn it at any time under sect. 40 (2) of the Act of 1921, and that, therefore, their act in providing the school was voluntary, and not in pursuance of any public duty. I do not think this argument sound, and it is contrary to a long series of authorities. It does not matter that the public duty is one which the defendants need not undertake. It is enough if they have adopted a course of action which imposes upon them the performance of a public duty at the material time, and if the matter of which complaint is made is a default in carrying it out. *Fielden* v. *Morley Corpn.* (10), *Jeremiah Ambler & Sons, Ltd.* v. *Bradford Corpn.* (26) and *Lyles* v. *Southend-on-Sea Corpn.* (12) are examples of this principle.

However, the appellants say that, even if this be true, the managers were under no duty to carry out their work in the way they chose. There was no need to hold a display or invite parents to attend it. Again, I think this immaterial. As Scrutton, L.J., said in *Edwards* v. *Metropolitan Water Board* (22), at p. 306, it does not matter that the duty could have been carried out in another way. In support of that proposition, he cited *Edwards* v. *St. Mary, Islington, Vestry* (27). If the argument were sound, the Public Authorities Protection Act, 1893, would be of little use, since, I imagine, in most cases there are at least two ways of performing a duty, and it might be said that the alternative to that actually chosen could have been adopteds It was further maintained, however, that the act of inviting Mrs. Griffiths to visit the premises was permitted, but not enjoined, by the Act, and that in such a case the authorities were not executing a public duty, but engaged in a private act.

In support of this argument such cases as *Myers* v. *Bradford Corpn.* (3) and *Hawkes* v. *Torquay Corpn.* (28) were called in aid. Both were cases of contract, and I think it is true to say that a private contract, even if entered into in pursuance of an Act of Parliament, is not thereby protected, but an act which is done in performance of a public duty is still done in the execution of a public duty though it is performed through the medium of a contract. The cases last quoted are examples of the former principle. *Edwards* v. *Metropolitan Water Board* (22) and *Clarke* v. *Bethnal Green Borough Council* (21) are examples of the latter.

Where the act done is permitted but not enjoined, the question whether the authority is executing a public duty or merely entering into a private contract is a question dependent upon the true deduction to be drawn A from the facts rather than one of pure legal principle. How narrow the line may be is exemplified by the suggestion of PHILLIMORE, L.J., in *Clarke* v. *St. Helens Borough Council* (29) that, whereas an authority was not protected if its engineer in the course of his duty was being driven by a negligent chauffeur, yet it might have been protected had the B engineer been driving himself and had himself driven negligently, and is also exemplified by the opinion of BANKES, L.J., in *Edwards* v. *Metropolitan Water Board* (22). In his view, if the coke which in *Myers* v. *Bradford Corpn.* (3) was being delivered in pursuance of a contract had not been sold, but had been carted away, in order that the authority C might get rid of it, and so make room to enable it to meet its statutory obligation of providing gas, the authority would have been protected In the latter case, the carting would have been necessary (directly necessary, if that phrase be preferred) in order that its members might comply with their public duty. As it was they were held merely to be fulfilling D a private contract.

The true position is, I think, put by LORD SHAW OF DUNFERMLINE in *Myers* v. *Bradford Corpn.* (3) at p. 263 :

> If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising. A municipal tramway car depends for its existence and conduct on, say, a private and many public acts ; and the corporation in running E it is performing a public duty.
>
> When a citizen boards such a car, in one sense he makes, by paying his fare a contract; but the boarding of the car, the payment of the fare, and the charging of the corporation with the responsibility for safe carriage are all matters of right on the part of the passenger, a public right of carriage which he shares with all his fellow citizens, correlative to the public duty which the corporation owes to all . . . But where the right of the individual cannot be correlated with a statutory or public duty to F the individual, the foundation of the relations of parties does not lie in anything but a private bargain which it was open for either the municipality or the individual citizen, consumer, or customer to enter into or to decline.

In that case the sale of coke was held to have been effected by a private bargain, with no correlative public duty, and the corporation was unprotected, just as in *Palmer* v. *Grand Junction Ry. Co.* (30) it was determined G that the defendants, who were authorised by their private Act to charge tolls for the conveyance of animals, were not entitled to notice and a 3 months' limitation of action under sect. 214 of that Act. That was a case in which certain horses were being carried by the defendants as H common carriers and were injured by their negligence. PARKE, B., said, at p. 766 :

> If the action was brought against the railway company for the omission of some duty imposed upon them by the Act, this notice would be required . . . But when the matter is looked at and explained, it appears that the action is not of that nature, but the defendants are sued as common carriers . . . and it appears to me that a breach of their duty in that character is not a thing omitted to be done in pursuance of the Act or in the execution of the powers or authorities given by it. The Act does not

> compel them to be common carriers; it only enables them to be so, so far as they shall think fit; and when they have elected to become so, they are liable in that character, in the same way as other common carriers are.
>
> In neither case were the defendants, in performing the act complained of, carrying out a public duty, in each they were acting in pursuance of a private contract.

Finally, it was argued that the invitation to Mrs. Griffiths was not issued in direct performance of a public duty, but was merely an act incidental to its performance, and, as such, unprotected. A *Clarke* v. *St. Helens Borough Council* (29) was quoted in support of this argument. For my own part, I doubt if the addition of the epithet "direct" adds clarity to the meaning of the word "performance," nor is the use of the word "incidental" very helpful. It has still to be determined what is B "incidental" and what is "direct," I can only say that in the present case I find myself in agreement with SIR WILFRID GREENE, M.R., when he says, at p. 83:

> It is not right, in my opinion, to say, as was said by counsel for the appellant, that one must be able to put one's finger upon some specific duty in the Act before the C Act can apply. Acts of Parliament which impose public duties do not, as rule, concern themselves with details. There are many different ways of carrying out a public duty, and, with regard to any step, it is almost always possible to say that it is optional. The point of the matter is what they were doing when they issued this invitation. Were they carrying on a public elementary school? The answer is that they were.

Like the judge and the Court of Appeal, the invitation was, I think, D issued in performance of a public duty, and, if the adjective "direct" is thought to add greater exactitude, then its issue was in direct performance of such a duty.

In *Fielden* v. *Morley Corpn.* (10), LINDLEY, L.J., foresaw that "some day there will probably be a great discussion as to what acts or defaults E do or do not come within it [the Public Authorities Protection Act]." In *Myers* v. *Bradford Corpn.* (3), LORD BUCKMASTER, L.C., said that he was conscious that his opinion did not establish so clear and distinct a line as he would wish to see, and in *Edwards* v. *Metropolitan Water Board* (22), SCRUTTON, L.J., found the same difficulty. F Some principles have been, and can be, laid down which may assist in the application of the Act, but, like LORD HALDANE in the former case, I doubt whether it ever will be possible to lay down some general principle by which all cases can be tested. At any rate, it is unnecessary to make the attempt in the present instance. G Enough has been said to show your Lordships why I agree with the courts below in thinking that the action fails and the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Jordan & Co.*, agents for *Silverman & Livermore*, Liverpool H (for the appellants); *Preston, Lane-Claypon & O'Kelly*, agents for *Gamon, Arden & Co.*, Liverpool (for the respondent school managers); *Pritchard, Sons, Partington & Holland*, agents for *Buckley, Pidgeon, Watson & Blackwood*, Liverpool (for the respondent Liverpool Church of England Schools Society).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Re TWISS, BARCLAYS BANK, LTD. *v.* PRATT AND OTHERS.

[CHANCERY DIVISION (Simonds, J.), **November 21, 1940.]**

Executors—Legacies—Annuities to several persons free of tax—Rights of survivorship—Deferred annuities to infants—Valuation of annuities—Rate of income tax and allowances.

The testator bequeathed annuities of £416 each free of all duties and income tax to A.A.P. and J.A.B., and, on the death of the survivor of himself and J.A.B., annuities of £260 and £156 per annum to D.L. and N.A.B., respectively, the children of J.A.B., and, on the death of the survivor of himself and J.A.B. and D.L., annuities of £78 per annum to each of the three children of D.L. then living. He also made bequests of property and chattels, and he gave specific pecuniary legacies to certain named persons and residuary legacies to named charities. The income of the estate being insufficient to pay the annuities, it had to be determined what method should be adopted to satisfy the legacies and annuities, and, if the annuities should have to be valued, at what date the valuation should be made, and what rates of income tax and allowances should be taken :—

HELD : the correct date at which to make the valuation was the date of the order, and the rates of income tax and allowances in force at that date should be taken. If the estate was sufficient, the value of the annuities were to be paid in full, and, if not, they were to be abated *pari passu*. The deferred annuities should be satisfied by the purchase of deferred annuities based on the Government tables, and, where these were given to infants, they should be retained by the trustees.

[EDITORIAL NOTE.—This case follows the decision in *Re Ball, Lucas* v. *Ball* (1). It carries the matter a step further, however, as some of the annuities are deferred, and, in some cases, are given to infants.

AS TO VALUATION OF ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 358, 359, para. 669; and for Cases, see DIGEST, Vol. 23, pp. 420, 421, Nos. 4913-4926.]

Cases referred to :

(1) *Re Ball, Lucas* v. *Ball*, [1940] 4 All E.R. 245 ; Digest Supp.

(2) *Re Cox, Public Trustee* v. *Eve*, [1938] Ch. 556 ; [1938] 1 All E. R. 661 ; Digest Supp. ; 159 L.T. 13.

(3) *Re Cottrell, Buckland* v. *Bedingfield*, [1910] 1 Ch. 402 ; 23 Digest 421, *4924 ;* 79 L.J.Ch. 189 ; 102 L.T. 157.

(4) *Re Dempster, Borthwick* v. *Lovell*, [1915] 1 Ch. 795 ; 23 Digest 420, *4918 ;* 84 L.J.Ch. 597 ; 112 L.T. 1124.

(5) *Re Ellis, Nettleton* v. *Crimmins*, [1935] Ch. 193 ; Digest Supp. ; 104 L.J.Ch. 53 ; 152 L.T. 370.

(6) *Re Metcalf, Metcalf* v. *Blencowe*, [1903] 2 Ch. 424 ; 39 Digest 161, *529 ;* 72 L.J.Ch. 786 ; 88 L.T. 727.

ADJOURNED SUMMONS to determine, *inter alia*, what method should be adopted to satisfy the pecuniary legacies and annuities bequeathed by the will of George Twiss, and, if the annuities have to be valued, at what date the valuation should be made, and, for the purposes of the annuities given free of tax, what rates of income tax and allowances should be made.

The testator, George Twiss, whose will was dated Oct. 7, 1936, died on April 11, 1939, and his will was proved on June 15, 1939. By his will, he appointed the plaintiffs to be executors and trustees, and, after making specific bequests of a dwelling-house and chattels, he gave the following annuities: £416 per annum each to Amelia Annie Pratt and to Jane Ann Barker free of duties, deductions, income tax and allowances, on the death of the survivor of himself and Jane Ann Barker, to Dorothy Lord and Norman Barker £260 and £156 per annum respectively, and, on the death of the survivor of himself, Jane Ann Barker, and Dorothy Lord, £78 per annum to each of the three children of Dorothy Lord then living. He gave certain pecuniary legacies, and the residuary estate after the payment thereout of debts, funeral and testamentary expenses, to St. Dunstans, the Nazareth Home for Aged Poor and Orphan Children, and the National Society for Prevention of Cruelty to Children. There was also an annuity of £52 per annum to William Brown, who predeceased the testator. Clause 13 of the will gave a power to appropriate out of the income of the estate in satisfaction of the annuities, and a power to resort to capital if the income should prove to be insufficient. The income was insufficient to pay the annuities, although the estate was sufficient to buy annuities and pay the annuitants the capital value.

B. G. Burnett-Hall (for *G. Maddocks*) for the plaintiffs.

R. A. Forrester for the first four annuitants.

R. W. Goff for the infant annuitants.

Gilbert Dare for the charities entitled to five-sixths of the residue.

A. Guest-Mathews (for *F. C. Watmough*) for the remaining charity, the National Society for the Prevention of Cruelty to Children.

H. O. Danckwerts for the pecuniary legatee.

Burnett-Hall stated the facts.

Forrester: The date of order should be the date taken for the valuation in this case. Since the estate was only subsequently discovered to be insufficient, the rule laid down in *Re Cox* (2), following an earlier line of cases, should be followed, and the rates of tax in force at the date of the valuation should be taken, that is, at the date of the order.

Goff: In *Re Cox, Public Trustee* v. *Eve* (2), it was held that the rule in *Re Cottrell, Buckland* v. *Bedingfield* (3) ought to be followed even when the estate was actuarily solvent. However, notwithstanding the fact that *Re Cox, Public Trustee* v. *Eve* (2) purported to follow *Re Cottrell, Buckland* v. *Bedingfield* (3), actually it did not do so, as the date for the valuation in the latter case was the date of the death. Since *Re Cottrell, Buckland* v. *Bedingfield* (3), the date of the order seems to have been taken (*Re Dempster, Borthwick* v. *Lovell* (4) and *Re Ellis, Nettleton* v. *Crimmins* (5)), but the true principle is laid down in *Re Metcalf, Metcalf* v. *Blencowe* (6). The valuation should be taken at the date of the death if the insufficiency is immediately apparent, and at the date of the order if it only appears subsequently: *per* LORD ROMILLY, at pp. 428, 429. In this case, the executor's year had only just terminated, and in substance the insufficiency had appeared immediately, and, therefore, the right date for the valuation was that of the death. In *Re Ball, Lucas* v. *Ball* (1), the tax and allowances were taken at the date of the order, as that was the date for valuation in that case.

Dare: The correct date is the date of the death, the income of the A estate being insufficient at that date to provide for the annuities. The authorities can be reconciled only on the footing that the correct date for valuation is the date of death where the deficiency exists at that date, but that the court will not value an annuity which has ceased to be payable before the order of the court. If the date of the order be taken, the B beneficiaries may be left to the mercy of negligent trustees or to any fraudulent claim which may hold up administration. The decision of WARRINGTON, J., in *Re Cottrell, Buckland* v. *Bedingfield* (3) was right in principle on this point, and should be followed.

Mathews: The valuation should be made at the date of the death, which C is the one fixed point of time about which there can be no dispute.

SIMONDS, J.: This case is governed for me by the decision of FARWELL, J., in *Re Ball, Lucas* v. *Ball* (1), in which he states that it is hard that the rule should be applied in such a way that an annuitant who has D died since the death of the testator should thereby be prejudiced, but he does not suggest that the rule has come into existence because it would operate unfairly in one way or another. It is a general rule that, where the valuation of annuities is necessary, it should be made as at the date of the order. That is the rule as he states it, and it is a rule E which has been clearly laid down in earlier cases, and it is a rule which I must follow in this case. Accordingly, the annuities must be valued as at the date of the order, and, for that purpose, the rate of income tax then prevailing and the reliefs in respect of income tax then prevailing are to be taken into account. When those annuities have been so F valued, then the legacies and the amount of such valuations must be paid in full if the estate is sufficient, and, if it is not, they must be abated *pari passu*. Some of the annuities are deferred annuities payable to infants, and it has been suggested on their behalf that the amount which would be payable to them if they were capable of giving a discharge G should be retained by the trustees and invested in the purchase of a deferred annuity upon the terms of the will, and that such annuities should be retained by the trustee on their behalf. That seems to me to be a wise and prudent course to adopt on behalf of the infants.

Accordingly, I shall direct that the trustees do purchase on behalf H of the infants deferred annuities, based on Government tables, such annuities to be held upon the terms of the will as the amount coming to them shall be sufficient to purchase.

Costs of all parties as between solicitor and client to come out of the estate.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *William Walker*, Manchester (for the plaintiffs and for the eighth defendant, the legatee; *Wm.*

Walker, Manchester (for the first four defendants) ; *Torr & Co.*, agents for *C. B. Hudson & Taylor*, Rochdale (for the three infant defendants) ; *Charles Rackham & Co.* (for the ninth defendant) ; *Ranger, Burton & Frost*, agents for *Wise & Wise*, Manchester (for the tenth defendant) ; *Robbins, Olivey & Lake*, agents for *Wilding, Earley & Pegge*, Manchester (for the last defendant). A

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Re NATIONAL PROVINCIAL BANK, LTD.

[CHANCERY DIVISION (Farwell, J.), **December 10, 1940.]**

Emergency Legislation—Mortgage—Realisation of mortgage—Proceedings against property charged—Collateral security without personal covenant—No necessity for leave to proceed—Courts (Emergency Powers) Act, 1939
A (*c.* 67), *s.* 1 (4).

Where a mortgagor has mortgaged his property as a security for the debt of a third party and no personal obligation exists between him and the mortgagee for the debt, the mortgagor cannot avail himself of the protection of the Courts (Emergency Powers) Act, 1939, if the mortgagee desires to proceed against the property, since he is not a
B person defined in sect. 1 (4) of the Act as " the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation."

[EDITORIAL NOTE. Put quite shortly, the decision here is that a collateral mortgage containing no covenant by the mortgagor to pay the money secured can
C be enforced against the property charges without reference to the Courts (Emergency Powers) Act, 1939. It should be noted that enforcement against the property includes the appointment of a receiver of the rents and profits of the property.

AS TO EMERGENCY POWERS, see HALSBURY, Hailsham Edn., Vol. 23, pp. 464, 465, para. 683 ; and FOR CASES, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103.]

D PROCEDURE SUMMONS to determine whether the National Provincial Bank should obtain leave of the court under the Courts (Emergency Powers) Act, 1939, in order to avail themselves of their remedies under a mortgage, dated Apr. 1, 1935, made between themselves and the respondent. The facts are fully set out in the judgment.

E *P. B. Morle* for the applicants.

W. J. K. Diplock (for *J. C. B. W. Leonard* on war service) for the respondent.

FARWELL, J.: This summons raises a curious point. It is an
F application by the National Provincial Bank, Ltd., against one Thomas Edmund Liddiard for (i) realisation of certain property in Tunbridge Wells which was mortgaged by Liddiard to the bank by a mortgage, dated Apr. 1, 1935, made between Liddiard of the one part and the applicants of the other part to secure the moneys more particularly
G referred to therein, or (ii) the appointment of a receiver of the rents and profits, or (iii) the taking possession thereof. The bank seek the leave of the court to exercise their remedies as mortgagees by taking possession of the property and exercising their other rights. Evidence has been filed by the respondent giving reasons why the court ought
H not to permit the mortgagees to exercise their powers, having regard to circumstances which have arisen, and which, according to the respondent's evidence, are directly or indirectly due to the war, and sufficient to entitle the mortgagor to relief under the Act.

The mortgage is not a mortgage to secure money owing by the mortgagor, but it is a mortgage on this particular property belonging to

Liddiard to secure money owing to the bank by Mrs. Milburn, his daughter. The form of the mortgage is one quite commonly used by banks. It is a legal charge made on Apr. 1, 1935, between Liddiard, as mortgagor, of the one part and the bank of the other part. The mortgagor as beneficial owner charges by way of legal mortgage the property

> . . . with payment to the bank on demand of all such sums of money as now are or shall from time to time become due or owing to the bank anywhere upon banking account or upon any discount or other account or for any other matter or thing whatsoever including interest discount commission and all other banking charges from or by Mildred Bessie Milburn, of Tunbridge Wells in the county of Kent, married woman.

Then the mortgage contains the usual provisions :

> (*a*) The mortgagor will at all times during the continuance of this security keep the buildings [in a state of good repair] ; (*b*) The statutory power of sale shall be exercised at any time after the expiration of one month next after the bank shall have demanded payment by the mortgagor of the moneys owing on this security without regard to the Law of Property Act, 1925, s. 103, which section shall not apply ; (*c*) The mortgagor shall not without the previous written consent of the bank exercise any of the powers of leasing or of agreeing to lease or of accepting surrenders conferred upon mortgagors by the Law of Property Act, 1925.

There are other provisions which are usual in a mortgage of this sort, including a provision that it is to be a continuing security for the whole amount due and that the mortgagor attorns tenant from year to year to the bank, the rent being a peppercorn rent.

Mrs. Milburn has found herself unable to pay the bank, and the bank have demanded payment of the amount due by her from the mortgagor, Liddiard. Liddiard is under no personal obligation whatsoever under this mortgage to pay anything to the bank. His position is that he has an option open to him. Either he can pay the bank the money owing by his daughter, or, if he does not pay the bank, he is in peril of having his property seized by the bank.

In the circumstances, the bank, being desirous of exercising their right to possession of the property, have applied to the court for leave under the Courts (Emergency Powers) Act, 1939. Having applied for such leave, they are now coming to the court and saying that they do not in fact require any leave in this case, because the Courts (Emergency Powers) Act, 1939, does not apply in this particular case, and that, therefore, they are entitled to proceed to exercise their remedies without having to obtain the leave of the court at all.

The question which arises—and I think that it is of some difficulty—is whether the true view is that the leave of the court is not necessary at all in this particular case, or whether the true view is that they have to obtain the leave of the court, in which case it will be necessary for the court to go into all the circumstances and see whether or not this is a case in which the mortgagees should be given leave, and, if so, on what particular terms, to employ the remedies otherwise open to them. For the moment, I am not dealing at all with the merits of this particular application. I am dealing with a very much wider point—namely, whether or not this is a case which comes within the Act at all. The Courts (Emergency Powers) Act, 1939, s. 1 (1), provides as follows :

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court . . . for the payment or recovery of a sum of money . . .

There is nothing in that subsection which has any application at all. Subsect. (2) provides as follows :

> Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, (*a*) to proceed to exercise any remedy which is available to him by way of. . . (ii) the taking of possession of any property or the appointment of a receiver of any property . . . (*b*) to institute any proceedings for foreclosure or for sale in lieu of foreclosure. . .

Then there is a proviso as follows :

> . . . this subsection shall not apply to any remedy or proceedings available in consequence of any default in the payment of a debt, or the performance of an obligation, being a debt or obligation arising by virtue of a contract made after the commencement of this Act . . .

That does not apply in this case. Subsect. (4) is the subsection which I think is really the material one. It provides as follows :

> If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in subsects. (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper.

The section, as will be seen, applies in this way. It is for the person who is seeking to exercise the powers of, for example, foreclosure to apply for such leave, and it is for the respondent, the person against whom the leave is sought, to show that he is entitled to relief under the Act because he can bring himself within the provisions of subsect. (4). That person, therefore, has to satisfy the court that he is a person "liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation," and that he is "unable immediately to do so by reason of circumstances directly or indirectly attributable to" the war.

The question is whether in this case Liddiard, who is the respondent, is able to satisfy the court that he is a person liable to perform the obligation against which he is seeking this relief. "The obligation" must mean, as it seems to me, the obligation which arises under the mortgage which the mortgagee is seeking to enforce. The mortgagee's only right to take possession of the property and realise his security is such right as he may have against the mortgagor by virtue of his mortgage. Therefore, in order that the matter may come within subsect. (4), I think that it is necessary to find that there is an obligation on the mortgagor which he is unable to satisfy by reason of circumstances directly or indirectly attributable to the war. In the present case, so far as I can see, he is under no obligation whatsoever to the bank. He is in this position. The bank has demanded payment of the money owing by Mrs. Milburn. That does not create an obligation upon the mortgagor to pay anything. It puts him in this position. Either he must find the money which is demanded or the mortagees will be entitled to realise their security. The fact that he is put in that dilemma does not create an obligation of any sort or kind upon him. If he chooses not to pay, or is unable to pay, he may find himself in the unhappy position of having his property taken away from him. That may be his misfortune, but that does not create an obligation upon him which he has to satisfy and which arises from the mortgage into which he has entered. The mortgage creates no such obligation whatsoever.

The position is, therefore, that this is not a case, as it seems to me, which comes within the Act at all. It may be that it is a *casus omissus*. It may be that, if the Act had intended to protect a person in the position of the mortgagor in this matter by giving an opportunity of getting relief under the Act, it would have so provided, but it has not, so far as I can see, on the language of the Act, made any such provision for this particular case, and, in the circumstances, it is not for me to make a remedy by giving to the words "perform the obligation" a meaning which, in my judgement, they cannot bear. The truth of the matter is that this does not come within the Act at all. This mortgagor is in the unfortunate position of not being able to take the remedy open to him of relieving his property by paying money which Mrs. Milburn owes, but that does not create an obligation upon him to pay the money, and the fact that he cannot pay will have the result that the bank will be entitled to exercise their remedies by way of realising the property. I am unable in this case to give the respondent any relief under the Courts (Emergency Powers) Act, 1939, not because he has not shown sufficient cause—because I have not considered that at all—but because, in my judgment, the Act does not provide for this particular case.

Then it is said that, in the circumstances, I ought to allow Mrs. Milburn to be added as a respondent, and that I ought to give relief in respect of her. The answer to that is that it is not for me, at the application of Liddiard, to add Mrs. Milburn to this summons. If the mortgagees choose to proceed to exercise their remedies against the property itself, and if it turns out afterwards that they ought to have got leave from the court as against Mrs. Milburn (as to which I express no view whatever), that will be at their peril, and Liddiard may have a remedy. So far as this particular summons, which is a summons taken out by the bank against Liddiard, is concerned, I can do nothing more than dismiss it, on the ground that no leave is necessary, because the case is not one which is provided for by the Act itself.

Summons dismissed. No order as to costs.

Solicitors: *Wilde, Sapte & Co.* (for the applicants); *Cripps, Harries, Hall & Co.* (for the respondent).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

DAN & STONE, LTD. *v.* LENNARD.

[COURT OF APPEAL (Scott, MacKinnon and Luxmoore, L.JJ.), **December 6, 1940.]**

Workmen's Compensation—Incapacity—Partial incapacity treated as total incapacity—Form of order—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 9 (4)—*Workmen's Compeasntion Act,* 1931 (*c.* 18), *s.* 1.

In an award of workmen's compensation made under the Workmen's Compensation Act, 1925, s. 9 (4), as amended in 1931, the county court judge made an order in the following terms : " I order that the incapacity of the said applicant (if and so long as he remains unemployed) shall be treated as total incapacity resulting from the said injury, subject to the condition that such order shall cease to be in force if the said applicant receives unemployment benefit and to no other condition " :—

HELD : the condition in the order should be worded as follows : " if and so long as he remains unemployed, or until weekly payments hereinafter directed shall be ended, diminished, increased or reduced in accordance with the provisions of the above-mentioned Acts."

[**EDITORIAL NOTE.** The form of order where partial incapacity is to be treated as total incapacity has been the subject of some discussion, and has on one occasion been amended. It would seem that even the amended form is not free from ambiguity, and the Court of Appeal have found it unsuited to the present case. At least two possibilities have to be provided for. The first is that the workman may obtain work for a short period, and thus cease to receive unemployment benefit. He would, however, upon becoming unemployed again, receive unemployment benefit again, a happening for which the order does not seem to provide. The second possibility is that the employer may wish to apply for a review of the compensation. It is the intention of the Act that the position with regard to review shall remain unaltered.

As to PARTIAL INCAPACITY TREATED AS TOTAL INCAPACITY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 926-929, paras. 1271-1273 ; and FOR CASES, see DIGEST, Vol. 34, pp. 402-406, Nos. 3284-3306. See also WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 314-327.]

Cases referred to :

(1) *Darracq Motor Engineering Co., Ltd.* v. *Seaward* (1935), 28 B.W.C.C. 64 ; Digest Supp.

(2) *Marsh* v. *Robert Parker, Ltd.* (1932), 25 B.W.C.C. 197 ; Digest Supp.

APPEAL by the respondents from an award of His Honour JUDGE CLEMENTS, dated Oct. 14, 1940, and given in the Faversham County Court. The facts are fully set out in the judgment of SCOTT, L.J.

F. W. Beney for the appellants.

The respondent did not appear and was not represented.

SCOTT, L.J. : This case concerns an application by the workman with regard to the amount of the weekly compensation which, at the time of the application, was being paid to him by the respondents in respect of injury coming within the Workmen's Compensation Act, 1925, and caused by an accident at their works. The point which calls for decision by us is the form of order to be made by the county court judge. His order was as follows :

(1) I order that the incapacity of the said applicant (if and so long as he remains unemployed) shall be treated as total incapacity resulting from the said injury,

> subject to the condition that such order shall cease to be in force if the said applicant receives unemployment benefit and to no other condition. (2) And I order that the respondents Dan & Stone, Ltd., do pay the said applicant the weekly sum of £1 10*s.* as compensation for personal injury to the said Horace Lennard on Feb. 24, 1939, by accident arising out of and in the course of his employment as a workman employed by the said respondents, such weekly payment to commence on July 8, 1940, and to continue during the total or partial incapacity of the said Horace Lennard for work or until the same shall be ended, diminished, increased or redeemed in accordance with the provisions of the above-mentioned Act . . . A

The other details of the order are irrelevant.

The appellants' solicitors wrote to the workman's solicitors on Nov. 1, 1940, in these terms:

> We have received the award from the court and observe that it is completed in such a way as to ensure to your client the benefit of sect. 9 (4) of the Act so long as he is unemployed. We consider that this is objectionable and we have received instructions to apply to have this condition erased. B

Then they ask the assent of the workman's solicitors to that erasure in order to save costs. On Nov. 5, the workman's solicitors replied as follows:

> C We are in receipt of your letter of Nov. 1, which we have carefully considered. You will remember that sect. 9 (4) has been repealed and a new enactment made by the Workmen's Compensation Act, 1931. Having regard to the wording of that Act and to *Darracq Motor Engineering Co., Ltd.* v. *Seaward* (1) to the rules and the amended Form 24 (B) contained therein, we do not see that we should agree to any amendment of the order. Sect. 1 (2) of the Act of 1931 reserves the right to review and we suggest is sufficient protection to your clients.

D Upon the receipt of that letter, the appellants gave notice of appeal, and asked this court to set aside the order or to vary it so as to omit therefrom the words "if and so long as he remains unemployed."

The amendment of the law made in 1931 is as follows:

> Subsect. (4) of sect. 9 of the Workmen's Compensation Act, 1925, is hereby repealed, and the following subsection shall be substituted therefor: "(4) If a E workman who has so far recovered from the injury as to be fit for employment of a certain kind has failed to obtain employment and it appears to the county court judge either (i) that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident, or (ii) that his failure to obtain employment is a consequence, wholly or mainly, of the injury, the judge shall order that the workman's incapacity shall be treated F as total incapacity resulting from the injury for such period, and subject to such conditions, as may be provided by the order, without prejudice, however, to the right of review conferred by this Act: Provided that (i) no order shall be made under this subsection if it appears to the judge that the workman has not taken all reasonable steps to obtain employment; and (ii) every such order shall be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit.

G In consequence of that amendment, in 1933 it was provided (by the Workmen's Compensation Rules, 1933) that the form of order should be amended by reciting the accident and reciting that it was probable that the workman would, but for the continuing effects of the injury, be able to obtain work, or the failure to obtain employment was in H consequence, wholly or mainly, of the injury, and paras. 1 and 2 were to run as follows:

> (1) I order that the incapacity of the said [workman] . . . shall be treated as total incapacity resulting from the injury for the period to [the date from which the period is to run and the date at which it is to end], subject to the condition . . . that such order shall cease to be in force if the said [workman

> receives unemployment benefit and to no other condition. . . . (2) And I order that the said [employers] do pay to the said [workman] the weekly sum of as compensation for the personal injury aforesaid, such weekly payment to commence as from the day of and to continue during the total or partial incapacity of the said workman for work or until the same shall be ended, diminished, increased or redeemed in accordance with the provisions of the above-mentioned Acts . . .

A The matter came before the Court of Appeal in 1932 in *Marsh* v. *Robert Parker, Ltd.* (2). In that case, the court considered the form of order with great care and said that the provision of the statute as to form was not mandatory, but directory only, and might be modified to suit the circumstances.

B In 1935, in *Darracq Motor Engineering Co., Ltd.* v. *Seaward* (1), a similar question again arose, and in that case the court in effect drafted a somewhat different form of order. LORD HANWORTH, M.R., said, at p. 79:

> C The order will have to be altered, and I think the right form of order would be this. The order must be amended by adding in para. 2 the following words at the end of the first line: "if and so long as he remains unemployed"; so that para. 2 will read: "And I do order that the incapacity of the respondent if and so long as he remains unemployed," and so on. . . . Then we come to para. 3, which will be made to read as follows: "And I do order that the applicants do pay to the respondent the weekly sum [of shillings] as compensation for the personal injury aforesaid, such weekly payment to continue during the total or partial incapacity of the respondent for work during the said period of three months if D the respondent shall be so long unemployed."

As a result of the view expressed by the Court of Appeal in that case, Form 24B, as it now is, was inserted in Appendix B to the Workmen's Compensation Rules, 1926, by the Workmen's Compensation Rules, E 1936. As that form runs, it provides—I need not refer to the recitals—as follows:

> (1) I order that the incapacity of the [workman] if and so long as he remains unemployed shall be treated as total incapacity resulting from the injury for the period —— 19 , to —— 19 , subject to the condition . . . that such order shall cease to be in force if the said [workman] receives unemployment benefit and to no other condition . . . (2) And I order that the [employers] do pay to F the [workman] the weekly sum of as compensation [such weekly payment to commence as from a certain day, and to continue during the period already mentioned in para. 1] if the said [workman] shall be so long unemployed, or until the same shall be ended, diminished, increased or redeemed in accordance with the provisions of the above-mentioned Acts . . .

In the present case, the county court judge has evidently endeavoured G to follow that form of order as far as he could, but the result of his not inserting a fixed period, and of his providing that the incapacity shall be treated as total incapacity resulting from the injury for an indefinite future period, if and so long as the workman shall remain unemployed, is to produce an effect quite different from that intended by Form 24B. H The effect of the words at the end of para. (1), "and subject to no other condition," is to leave it open to the workman to argue that, as long as he is unemployed, the order must continue to remain in force. It is quite clear that that would be wrong. The power of the employer to ask for a review on the usual terms must continue, and I suspect that the county court judge thought that it would continue, but in the form of order adopted by him there is an ambiguity which leaves it open to the workman to put up that contention.

In our view, the appeal is right to the extent that the presence of the words "if and so long as he remains unemployed" in para. (1), without any reference in that paragraph to the right of review, might lead to an interpretation of the order such as I have indicated. Therefore, we think that, in order to make quite clear what the meaning of the order is, the form should be altered as follows: "I order that the incapacity of the said applicant shall be treated as total incapacity resulting from the said injury, if and so long as he remains unemployed, or until the weekly payments hereinafter directed shall be ended, diminished, increased or redeemed in accordance with the provisions of the above-mentioned Acts." The words "and to no other condition" must be deleted. That simple amendment will prevent the evil against which the employers sought a remedy by their appeal, and will give them the satisfaction which they desire. On the other hand, the request made by them for the simple deletion of the words "if and so long as he remains unemployed" was inadmissible, because those words must remain somewhere in the paragraph. Their simple deletion would have been open to objection on other grounds also. Therefore, whilst allowing the appeal and varying the county court judge's order by the words I have read, the [illegible] must do so without costs.

[illegible]Kinnon, L.J.: I agree.

Luxmoore, L.J.: I also agree.

Appeal allowed and county court judge's order varied.

Solicitors: *Barlow, Lyde & Gilbert* (for the appellants).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re LINDSAY'S SETTLEMENT (No. 1).

[Chancery Division (Farwell, J.), **December 11, 1940.]**

Settlements—Capital or income—Casual profits—Damages—Injury to land by improvements by river conservators—Agreement apart from arbitration.

Certain settled land bordered on the River Thames. Included in the settlement was a ferry, which had been let for a term of 50 years. The Thames Conservators obtained power from Parliament to make certain improvements, which, it was thought, would injure the settled land. Provisions were inserted in a private Act that compensation for injury to the ferry should, unless otherwise agreed in writing, be determined by arbitration under the Lands Clauses Consolidation Act, 1845. The question of compensation was in due course referred to an arbitrator, but, before the arbitration had proceeded at all, the arbitrator died. On account of the outbreak of war, the parties considered an arbitration inconvenient, and the matter of compensation was made the subject of an agreement. It was contended that the compensation was money paid under the Lands Clauses Consolidation Act, 1845, and, therefore, capital money:—

HELD: since the arbitration was abandoned, the moneys paid under the agreement were in the nature of damages, and, therefore, payable to the tenant for life as income.

A

[**EDITORIAL NOTE.** It was argued that moneys paid under the Lands Clauses Consolidation Act, 1845, must be in the nature of moneys arising upon the sale of the land, and, therefore, capital moneys. This point does not fall for decision, since it is held that the parties abandoned all procedure under that Act and made an agreement under the general law. The money paid under such an agreement

B is held to be in the nature of damages, and, therefore, payable to the tenant for life.

AS TO CASUAL PROFITS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 644-653, paras. 924-934; and FOR CASES, see DIGEST, Vol. 40, p. 656, Nos. 1953-1956.]

Case referred to:

(1) *Re Williams' Settlement, Williams Wynn* v. *Williams*, [1922] 2 Ch. 750;

C 40 Digest 656, *1955*; 92 L.J.Ch. 101; 128 L.T. 110.

ADJOURNED SUMMONS to determine whether certain sums of money paid to the trustees under an agreement, dated Nov. 18, 1939, between the tenant for life, the trustees of the settlement, the tenant of the ferry and the Conservators of the River Thames should be treated as capital

D or income. The facts are fully set out in the judgment.

A. H. Droop for the trustees.

C. R. R. Romer, K.C., and *V. P. M. S. O. Stranders* for the tenant for life.

E FARWELL, J.: This summons is taken out by the present trustees of a settlement, dated Oct. 26, 1923, asking for the determination by the court of the question whether certain sums of money which have been paid under an agreement made between the Conservators of the River Thames and the trustees and the tenant for life and the tenant

F of the particular ferry in question are capital money and form part of the settled property, or whether they are in the nature of a windfall, and, as such, belong to the tenant for life.

The facts, so far as they are relevant, are these. The settlement in question is dated Oct. 26, 1923, and was made on the occasion of the

G marriage of the present tenant for life, William Herbert Lindsay, and Miss Synnott. The settlement is of certain properties and lands, including certain lands in Middlesex and Surrey, which are referred to in the schedule to the settlement. Under the settlement, the provision is that the estates are held by the trustees and their heirs to the uses following:

H the use of the husband and his heirs until the solemnization of the intended marriage (the marriage was duly solemnized), and after the solemnization of the said marriage to the use of the husband during his life without impeachment of waste, including equitable waste. From and after the husband's death there is a yearly sum of £500 payable to the wife during her widowhood, and then there is a power to the husband to appoint by will or deed or new appointment :

> . . . to the use of or in trust for such one or more of the issue of the spouses (whether immediate or remote) in such form and manner in every respect (including a trust for sale if so desired) and upon such conditions and subject to such limitations or trusts to take effect by way of defeasance as (subject to the law relating to perpetuities) the husband may by deed with or without power of revocation and new appointment or by will or codicil appoint.

Up to the present moment, there has been no child of the marrriage of these spouses, but, of course, it is possible that there may be children yet, though up to the present moment there is none. Both the husband and wife are alive, and, under the settlement, the husband is the tenant for life. Then the ultimate trust in default of issue is to the husband, so that, if there are no children of the marriage, then the husband will become absolutely entitled to the estate, subject, of course, to any interest his wife may take. On June 7, 1926, there was a vesting deed duly vesting the property in the tenant for life, and the position was quite clearly established that the husband was the tenant for life, and, as such, was entitled to the possession of the property.

About 1933 the River Thames Conservators were proposing to carry out, or were desirous of carrying out, certain works on the River Thames, and the tenant for life and the trustees were apprehensive that, if such works were carried out, damage might result to the settled property. Accordingly, when the conservators sought power to carry out their desired works by Act of Parliament, the trustees and the tenant for life were represented and opposed the application, and did get inserted into the Act which the conservators obtained special provisions with regard to the land in question. The Act (which is the Public Works Facilities Scheme Thames Conservancy (River Improvement) Confirmation Act, 1933) contained a section to which I must refer quite shortly. Sect. 4 of the Act provides for the incorporation into the Act of the Lands Clauses Consolidation Act, 1845, in these terms :

> Subject to the necessary adaptations the following Acts and parts of Acts so far as the same are applicable for the purposes of and are not varied by or inconsistent with the provisions of this scheme are incorporated with and form part of this scheme (that is to say) : the Lands Clauses Acts (except sects. 127 to 131 of the Lands Clauses Consolidation Act, 1845) ; the provisions of the Railways Clauses Consolidation Act, 1845, with respect to the temporary occupation of lands near the railway during the construction thereof . . .

I need not refer to any other of the sections of this Act until I come to sect. 39, except to say that Part II of the Act, sect. 6, refers to the works which the conservators have power to do under the Act, and the first of the works, work No. 1, is the one in question which might, or which it was thought might, damnify the property of the estate. I need not refer further to the Act till I come to sect. 39, which provides as follows :

> The following provisions shall apply and have effect for the protection and benefit of William Herbert Lindsay and the trustees of the Lindsay Estates as owners of the ferry known as the Weybridge Ferry (in this section referred to as the owners) and of Frank Long as lessee of the rights in the said ferry (in this section referred to as the lessee) unless otherwise agreed in writing between the owners and the lessee for their respective interests as aforesaid and the conservators (that is to say) . . . (2) Any claim which may be made for compensation by the owners in respect

of diminution in the value of their rights in the said ferry or by the lessee in respect of an increased cost of labour by reason of the elongation of the said ferry in consequence of the construction of the said Work No. 1 shall be referable to arbitration under the Lands Clauses Acts and for the purposes of any such claim the said ferry shall be deemed to be lands within the meaning of the Lands Clauses Acts: provided that any such claim shall be made within 2 years from the completion of the said work.

A The damage which it was feared might result to the settled land by the works which were proposed was, first, damage to the right of ferry which formed part of the settled property known as the Weybridge Ferry. That right of ferry was the subject of a lease which had been granted by the tenant for life or his predecessors (I think by the tenant B for life), and which at that time had some 37 years to run. It was a lease at £200 per annum, and it was feared that, as a result of the operations on the River Thames, the ferry might be damaged, and that loss might occur to the estate by reason of the fact that, after the expiration of the lease, the chances of letting the ferry right might be reduced, and C less might be paid for it.

The other matter which concerned the estate was that certain property immediately adjoining the river and belonging to the estate might become liable to erosion as a result of the work done by the conservators, and thus that portion of the settled property might be damaged. They were D anxious, therefore, to protect the settled property by claiming such damages as were proper to indemnify them against the losses which they expected would result from the works when done. In order to protect the position, they sought for and obtained from CLAUSON, J., an order, dated Jan. 18, 1939, by which it was ordered:

E

> . . . that the applicant as tenant for life under the above-mentioned settlement . . . be at liberty to make a claim for compensation against the Conservators of the River Thames in respect of diminution in the value of the rights in the ferry known as the Weybridge Ferry settled by that settlement in consequence of the construction of certain works authorised by the Thames Conservancy (River Improvement) Act, 1933, and if necessary to take steps on a reference to arbitration of the said claim pursuant to the said Act but this order is to be without prejudice to any question as to whether and if so how any compensation recovered and the costs incurred F in connection with the claim ought to be apportioned as between capital and income.

That order authorised the tenant for life and the trustees, as representing the settled land, to put forward that claim as against the conservators. The result of putting forward the claim was that the matter was, in the G first instance, referred to arbitration under the Lands Clauses Act. There was some correspondence about the matter, but it was finally referred to arbitration, and an arbitrator was appointed accordingly.

The claims which were put forward by the tenant for life and the trustees were claims in respect of the ferry, which, as I said, was let for a term of H 50 years from Sept. 29, 1927, and a claim for damage to the reversion by the acts which the conservators were purporting to carry out. Claims were also put forward by the lessee of the ferry, and there was also a claim in respect of the possible damage to the ferry meadow, which was a strip of land which it was thought would be affected. The tenant for life and the trustees took advice as to the amount of damage which they ought to claim, and they were advised, by competent persons, as to the sort of sums which they could properly claim as damages. As I said, the claim ultimately was referred to arbitration, and Mr. Theobald Mathew was appointed arbitrator. Unfortunately, before the arbitration had proceeded at all, or anything had been done under it at all, Mr. Theobald Mathew died. Moreover, by that time the present war had begun, and the parties were busy people, who had other things to deal with, possibly more important than this sort of question, and they therefore finally agreed not to have an arbitration at all, but to settle the whole matter outright by having a conference between the conservators, the lessee of the ferry, the tenant for life and the trustees, and ultimately the agreement of Nov. 18, 1939, was entered into. I should say that, once the work which was proposed to be done by the conservators had in fact been carried out, it was found that the damage which it was thought the estate would suffer as the result of the works was very much less than had been expected. So far as the ferry was concerned, it was found that there was no very great difference made, and that the ferry could be carried on without any very substantial additional cost by reason of the works done by the conservators. Further, it was found that the erosion which they feared would be on a smaller scale, and that, having regard to the value of the land in question, the claim to any damage which could properly be supported would be very considerably less than the amount which they had originally thought it right to claim.

That being the position, the parties entered into this agreement, which was made on Nov. 18, 1939. It was made between the tenant for life, the trustees, the tenant of the ferry and the Conservators of the River Thames, and it recited as follows:

> The conservators have carried out works for the purpose of improving the River Thames and in particular have widened and deepened the River Thames and made new cuts in the vicinity of Weybridge Ferry and Ferris Meadow and other lands and properties of the owners . . . The owners are the owners of land and of the said Weybridge Ferry and the tenant is the successor in title of Frank Long and Edmund Batty (deceased) to whom the said ferry was demised by the said William Herbert Lindsay under a lease dated Jan. 3, 1928, for a term of 50 years from Sept. 29, 1927, under a deed of assignment dated Sept. 26, and made between the said Frank Long of the one part and the tenant of the other part.

The tenant claimed to be the owner of the ferry under the lease. Then it recites as follows:

> There is pending an arbitration in which the owners and the tenant are respectively claiming compensation for damage to them their interests lands and properties in the said ferry and the owners are also claiming compensation for damage to their lands known as Ferris Meadow all of which claims the conservators dispute. The river improvement works or some of them may have caused or may cause further damage to the interests lands and properties of the owners and tenant. The parties have agreed to settle their dispute and all or any further claims by the owners or tenant which may arise out of the execution of the river improvement works . . .

Then it is witnessed as follows:

> In consideration of the payment to the owners by the conservators of the total sum of £750 (which payment the owners hereby acknowledge) the owners and each of them hereby releases the conservators from all and any liability for compensation

> for loss or damage to them their interests lands or properties (including diminution in the value of their rights in the said ferry and damage to Ferris Meadow) which may have resulted or may result from any river improvement works which have been executed by the conservators prior to the date of this agreement in pursuance of the Public Works Facilities Scheme Thames Conservancy (River Improvement) Confirmation Act, 1933, or other statutory powers of the conservators.

Then para. 2 provides that, in consideration of the payment to the tenant A of £1,200, the tenant will release the conservators from all responsibility. Then there was an agreement with regard to costs, under which the conservators agreed to pay to the solicitors of the owners and tenant a sum in respect of their costs as from Apr. 20, 1933:

> . . . of and concerning their opposition to the scheme which was afterwards confirmed by the said Act, B and the insertion of a new clause or clauses in the bill for the protection of the owners and the tenant, and notices to treat given in pursuance of the said scheme to the owners and the tenant, and the claims of the owners and the tenant for compensation and the consequent arbitration, and the arrangement of this settlement as follows: The said solicitors shall present to the conservators a bill of their said costs whereupon the conservators may (if they think fit) for and on behalf of the owners and tenant have such bill of costs taxed as between solicitors and own client. Upon such taxation being completed the conservators shall pay C to the said solicitors either the sum of £1,750 or the amount of such taxed costs whichever be the less amount.

That agreement having been entered into, the sums which the conservators agreed under that agreement to pay were paid, and steps were taken with respect to the costs. The payments in respect of the D settled property were paid, not into court, as they would have been in the ordinary course under the Lands Clauses Act, but to the trustees. They are in the hands of the trustees, and this summons is taken out to determine whether the sums in question form part of the capital moneys of the estate or whether they belong to the tenant for life.

E It has been argued before me that these moneys are capital moneys, and that this transaction was something in the nature of a sale by the owner of the settled land. It is said that the tenant for life and the trustees were agreeing with the conservators to take certain sums of money in consideration of the release of their claim against the con- F servators for damage which they alleged the conservators had done to the settled property, and it is said that the moneys so paid were in fact moneys paid under the Lands Clauses Act, having regard to the terms of the private Act, and that, having been paid in that way, strictly speaking, they should have been paid into court, and, in those circum- G stances, they would be capital moneys, which would not be properly payable to the tenant for life at all. On the other hand, the tenant for life contends that what took place in this particular case was not anything done under the Lands Clauses Act at all. It is said: "It is true that the matter proceeded, up to the agreement for arbitration, H under and by virtue of the Lands Clauses Act, because it was incorporated into the private Act, but, having got so far, the parties then determined to abandon the arbitration, and to proceed, not under the Lands Clauses Act, but under the provisions of sect. 39 of the private Act, which enabled them to agree in writing to another method of determining or adjusting the rights of the parties. Under that section, they ceased to act under the Lands Clauses Act altogether and entered into an agreement which was an arrangement under which the conservators paid certain moneys and the estate, as represented by the tenant for life and the trustees, gave up all claims which they might have against the conservators in respect of that alleged damage, and, therefore, in those circumstances, the rights of the parties in respect of these particular sums of money, ought to be determined on the general law in relation to a payment of this sort, and not by any reference to the Lands Clauses Act." Counsel for the tenant for life was prepared to concede that, if this was a matter which was regulated by, and proceeded under, the Lands Clauses Act, it would be very difficult for him to support the contention of the tenant for life that these were not capital moneys, but he said that that was not the true position at all, because, though, up to the point when the parties were proposing arbitration, they may have been proceeding under that Act, as soon as they abandoned the idea of an arbitration, and did not appoint a new arbitrator after the death of the original arbitrator, and agreed, instead of proceeding by arbitration, to accept payments under this agreement, there was no longer a question of the matter being regulated by the Lands Clauses Act at all, and, in those circumstances, they should be dealt with completely under the general law, which, he says, passes the money to the tenant for life in certain events.

I have given this matter my best consideration, and I have listened with great interest to the interesting argument of counsel for the trustees, but I have come to the conclusion that in truth the tenant for life is right in his contention that this agreement was not an agreement entered into with any reference to the Lands Clauses Act at all. The arbitration was put an end to once the parties agreed not to proceed by arbitration at all, but to proceed in a different way—namely, by agreeing the amounts to be paid. That contention is the right one, and the matter is no longer one to be determined by the provisions of the Lands Clauses Act. That being so, all that remains for me is to decide what is the position of the parties, having regard to the general law which is to be applied. This is in fact a case where the conservators, acting legally (because they are acting under statutory powers), have done acts which have resulted in damage to the settled property, and the amount of that damage has been agreed between the tenant for life and the trustees as representing the settled property, on the one hand, and the conservators, on the other, by the payment by the conservators of these particular sums of money. In those circumstances, in my judgment, the moneys paid are in fact moneys to which the tenant for life is entitled. I think that this case is really almost exactly covered by the decision of SARGENT, J., in *Re Williams' Settlement, Williams Wynn* v. *Williams* (1). In principle, I can see no difference between that case and the present one, once one has reached the point that this is not a case to which the Lands Clauses Act applies at all, but is simply a case in which the moneys in question may or may not belong to the tenant for life, as the case may be. In this case, as in the case before SARGENT, J., the moneys in question represent damages which have been recovered for acts which have been lawfully done but which have resulted in damage to the property, and, as SARGENT, J., came to the conclusion in his case that that sort of payment was a payment to which the tenant for life is entitled, so, in the present case, I think that I am supporting his judgment by the view I take that these payments properly belong to the tenant for life, and, accordingly, should be paid to him, and should not be retained as part of the capital of the settled estate, and I make a declaration accordingly.

Declaration that payments belong to tenant for life. Costs taxed as between solicitor and client to be paid out of capital.

Solicitors: *Cohen & Cohen* (for the trustees and for the tenant for life).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

SOTHERN-SMITH *v.* CLANCY.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **November 26, 27, December 13, 1940.]**

Income Tax—Annuity payments—Contract to make annual payments in consideration of single premium—Aggregate of annual payments not to amount to less than amount of premium — Annuitant dying before receiving payments to amount of premium—Annuity payments continued to third person—Whether capital or income in hands of third person—Income Tax Act, 1918 (c. 40), *Sched. D, Case III, No.* 1.

In consideration of the respondent's brother paying to a life assurance society a single premium of $65,243·22, the society undertook to pay him a life annuity of $6,510, with a guarantee that, if at his death the annual sums paid did not equal the capital invested, the society would continue payments of the annuity to the respondent until the amount of the capital invested had been repaid. Thus, the aggregate amount payable by the society might exceed the capital invested, if the respondent's brother lived long enough, but could not in any event be less than the capital invested. The brother died after $26,040 had been paid, and the society continued to pay the respondent annual sums of $6,510. On these the respondent was charged with income tax:—

HELD: the contract was one to pay an annual sum for an ascertainable period of years or for the life of the respondent's brother, whichever might prove the longer, and the payments received by the respondent were income, and were properly charged with income tax.

Decision of LAWRENCE, J. ([1940,] 3 All E.R. 416) *reversed.*

[**EDITORIAL NOTE.** Where a capital sum is repayable by instalments, such instalments are in the nature of capital. It was sought to be argued that the $65,243·22 paid to the society was a capital sum to be repaid by instalments of capital. The Court of Appeal, however, have held that the contract in this case was of the nature of a life annuity contract—that is, one in which the capital sum, once paid, ceases to exist, and in which the amounts paid to the annuitant cannot be treated as instalments of that capital sum, or as having any definite relation to it. Where the annuity payments are to continue for the life of the annuitant, the total amount paid will of necessity depend upon the length of the annuitant's life. In the present case, it will be noticed that payments were to continue during the life of the respondent's brother, and, if he had lived long enough, the aggregate amount repaid would have exceeded the sum invested.

As to Annuity Payments, see HALSBURY, Hailsham Edn., Vol. 17, pp. 180-183, paras. 377-380 ; and for Cases, see DIGEST, Vol. 28, pp. 66, 67, Nos. 340-350.]

Cases referred to :

(1) *Secretary of State in Council of India* v. *Scoble*, [1903] A.C. 299 ; 28 Digest 65, *337 ;* 72 L.J.K.B. 617 ; 89 L.T. 1 ; *sub nom. Scoble* v. *Secretary of State for India*, 4 Tax Cas. 618.

(2) *Perrin* v. *Dickson*, [1930] 1 K.B. 107 ; Digest Supp. ; 98 L.J.K.B. 683 ; 142 L.T. 29 ; 14 Tax Cas. 608 ; *affg.*, [1929] 2 K.B. 85.

(3) *Foley (Lady)* v. *Fletcher* (1858), 3 H. & N. 769 ; 28 Digest 65, *336 ;* 28 L.J.Ex. 100 ; 33 L.T.O.S. 11.

(4) *Coltness Iron Co.* v. *Black* (1881), 6 App. Cas. 316 ; 28 Digest 6, *13 ;* 51 L.J.Q.B. 626 ; 45 L.T. 145 ; 1 Tax Cas. 287.

(5) *Jones* v. *Inland Revenue Comrs.*, [1920] 1 K.B. 711 ; 28 Digest 108, *667 ;* 89 L.J.K.B.129 ; 121 L.T. 611 ; 7 Tax Cas. 310.

(6) *Dott* v. *Brown*, [1936] 1 All E.R. 543 ; Digest Supp. ; 154 L.T. 484.

Appeal by the inspector of taxes from a judgment of Lawrence, J., dated June 6, 1940, and reported [1940] 3 All E.R. 416.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellant.

Cyril King, K.C., and *N. E. Mustoe* for the respondent.

The Attorney-General : It is clear that annuities are subject to income tax. They are expressly charged under Sched. D, Case II. The question before the court in the present case is whether or not payments which are not called annuities may be annuities, or, in other words, whether or not payments called annuities may not be annuities. In the present case, the covenant was to pay the original contracting party an annuity for his life, with a provision that, if he died before the payments had reached a sum calculated on the basis of the sum paid, the payments should be continued to a person to be nominated by him until the total annuity payments might equal that sum. The person nominated was the sister of the contracting party. The question involved is whether the payments made to the sister are taxable as annuities or are simply repayments of the capital sum. The term " capital invested," which was used by the parties, is appropriate in connection with the purchase of an annuity. In the present case, one finds in the contract the incidents of an annuity. From the point of view of the original annuitant, it is a simple life annuity, and life annuities are taxable. The courts have recognised that terminable annuities are annuities within the meaning of the Income Tax Acts. In every terminable annuity, there is the element that a man will receive back the amount he has paid. The amount which the man gets each year, however, is an annuity, and, therefore, it is taxable. In *Coltness Iron Co.* v. *Black* (4), it was held that the company was not entitled to deduct an amount spent in sinking new pits. In the present case, the sum paid is the measure of repayment. To say, however, that this contract is a contract to repay a sum of money without interest is to say something which cannot be maintained. In *Dott* v. *Brown* (6), it was held on the facts that the payments were repayments of capital. In the present case, there is the form of the payment of an annuity. It is a transaction of which the primary obligation is to pay a life annuity. As to that, no question can arise. The only question in the case arises from the fact that, if the man died before a certain sum had been returned, the annuity was to continue until that sum had been returned. This case is not like *Perrin* v. *Dickson* (2), in which the man could not get more than the sum paid. In the present case, if the respondent had lived long enough, the payments out would have borne no relation to the original sum.

Hills : Where the parties have commenced by saying that one of them is to pay an annuity to the other, the word " annuity " must not be cast aside. *Secretary of State in Council of India* v. *Scoble* (1) should not be interpreted as meaning that the word " annuity " does not mean what it says. In the present case, the term " annuity during the lifetime " is as clear as it can be. In *Scoble's* case (1), the contract was for the sale of an undertaking. In *Dott* v. *Brown* (6), the intention of one party was to liquidate his obligations. Where there is a purchase and sale, or the liquidation of a debt, the question of income tax does not arise. It has never been doubted, however, that an annuity, whether terminable or for life, is taxable. [Counsel referred to *Coltness Iron Co.* v. *Black* (4).]

King, K.C. : The judgment in this case was right. The contract in the present case is the converse of a contract of life assurance. It is indisputable that the sum paid each year under the contract in the present case is not paid upon a contract of life assurance. Likewise, it is not a terminable annuity, because it does not necessarily have a term of years. There is no item of interest in the annual payments. This contract falls into two parts. What was returnable on Sothern's death was a sum of money repayable by instalments. It is a misnomer to call it a terminable annuity, because the payments might have continued for the duration of Sothern's life. Sothern paid a lump sum, and, at the end of 10 years, nothing more than the money invested had been returned. In life assurance, nothing which is referable to the amount paid comes back. In the present case, Sothern would have received no profit unless he had lived more than 10 years. The payments made to the beneficiary after Sothern's death are repayments of capital. No interest is payable. The contract does not fulfil the test laid down by Rowlatt, J., in *Perrin* v. *Dickson* (2) as to what constitutes a life policy. On the face of the contract, the money which comes in equals money paid to the company. The money which was paid after Sothern's death is not in the least affected by life annuity principles. While Sothern was alive, the payments had no taxable quality about them. [Sir Wilfrid Greene, M.R., referred to *Foley* (*Lady*) v. *Fletcher* (3).] In that case, the payments were held not to be within the scope of the Act. Pollock, C.B., said that the question was whether the payments constituted an annuity or whether they were annual payments. There had been the sale of an estate, and the payments were due as capital. The property had been sold for a sum payable by annual instalments, which were held to be payments of a debt. There is no real distinction between the present case and *Perrin* v. *Dickson* (2). A The observations as to the effect of annuities in *Coltness Iron Co.* v. *Black* (4) were *obiter*, and they were apparently made without argument.

Mustoe : In dealing with such a case as the present, it is necessary to get at the substance of the transaction. Assistance can be derived from the words and from the form which the parties have employed. For B instance, the letter of application is made a part of the contract, and the term used in the letter of application is "refund annuity." The words "guaranteeing the term" are used. These words show the purpose of the transaction. The phrase "refund annuity" does not mean the whole transaction. The two words are used to show that the transaction is in C two parts. One part relates to the annuity and the other part relates to the refund of the whole sum paid. The whole of the money had to be returned, either to the annuitant or to the beneficiary. The transaction is an annuity transaction, plus a refund contract. The annuitant is given power to surrender the annuity. No power to surrender is given D to the beneficiary. The annuitant and the beneficiary are distinguished. It was pointed out by Rowlatt, J., in *Perrin* v. *Dickson* (2) that an annuity contract is one in which the capital is sunk and disappears, and there arises from it a right to receive an income. In the present case, the appellant is entitled to receive only the balance which remains E unrefunded on the death of the annuitant.

Hills, in reply : There can be no difference in law between the claim made by the beneficiary and that made by the annuitant. In the present case, the legal effect of the document is to entitle the payer of the money to nothing by way of return of capital. *Perrin* v. *Dickson* (2) was a F different case on the facts. One must have regard to the details in the present case. One finds the term "annual annuity." It was to be paid until the annuitant died. There was, however, a continuation of payments to a beneficiary for a certain period in a certain event. The main characteristic of the contract in the present case is that the G annuitant should have an annuity for his life. *Perrin* v. *Dickson* (2) does not decide the present case against the appellant, and all the other cases are in favour of the appellant. [Counsel referred to *Dott* v. *Brown* (6).]

Sir Wilfrid Greene, M.R. : On Dec. 24, 1928, the Equitable Life H Assurance Society of the United States made a contract with the late Edward H. S. Sothern whereby, in consideration of the payment by him of a sum of $65,243·22, the society agreed to pay to him an annuity of $6,510 during his life, and, after his death, in a certain event, to continue to make payments of the annuity for an ascertainable period to his sister, the respondent. Sothern died on Dec. 28, 1933, and assessments were made on the respondent for the 3 years 1935 to 1938 in respect of sums received by her under the contract. From these assessments the respondent appealed to the special commissioners, claiming that the payments in question were not payments of income, but were instalments of a capital sum. This claim was rejected by the special commissioners, but their decision was reversed by LAWRENCE, J., who held that the payments were payments of capital.

The case has throughout been conducted upon the footing that the respondent, although she was not a party to the contract, is entitled in law to claim from the society the sums which have been paid to her. It may be that this is in accordance with the law of the state of New York, by which the contract would seem to be governed. The assessments were made under Sched. D, Case III. The Income Tax Act, 1918, Sched. D, Case III, provides as follows :

> . . . Tax under this schedule shall be charged in respect of . . . (*b*) All interest of money, annuities, and other annual profits or gains not charged under Scheds. A, B, C or E, and not specially exempted from tax in each case for every 20*s*. of the annual amount of the profits or gains. 2. Tax under this schedule shall be charged under the following cases respectively ; that is to say . . . Case III. Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this case. . . .

Then Sched. D, Case III, r. 1 (*a*), provides as follows :

> The tax shall extend to (*a*) . . . any annuity or other annual payment, whether such payment is payable within or out of the United Kingdom. . . .

It is clear that an annuity or other annual payment falls to be charged with tax as being an "annual profit or gain," and this is the reason why it becomes necessary to examine the nature of an annual payment in order to see whether it is in truth an income or a capital payment—a question which cannot be answered merely by pointing to the fact that it is annual. Questions of this kind are notoriously difficult, and give rise to distinctions of a highly artificial character. The present case is no exception. It is no doubt true to say that, in order to answer the question, the real nature of the transaction must be ascertained. This proposition has an engaging appearance of simplicity, but it is not so simple as it sounds, for the expression "the real nature of the transaction" is ambiguous. It may mean the real nature of the legal relationship of the parties which results from the transaction, a matter which may not be in doubt, or it may include as well the real nature of the transaction from a financial point of view, a matter which at once raises a number of difficulties. If the transaction be one under which A, being or becoming indebted to B for a sum of £1,000, agrees with B to repay this sum by 10 yearly instalments, or if A, being the purchaser of property from B for £1,000, agrees to pay the purchase price by 10 yearly instalments, the real nature of the transaction from the legal point of view is that A is contracting to pay by instalments, in the one case, a debt, and, in the other, a purchase price. In such cases, the very nature of the legal relationship constituted by the contract prevents the annual payments from being anything but payments of capital. If to the instalments there is added an element of interest, that element would presumably attract tax as being an annual profit or gain. This would appear to be the result of *Secretary of State in Council of India* v. *Scoble* (1) and *Perrin* v. *Dickson* (2), although in *Foley* (*Lady*) v. *Fletcher* (3) the opposite view was expressed.

However, in other cases the real nature of the transaction from the legal point of view does not of necessity stamp it as a capital transaction. Let me take the simple case of a contract under which, in consideration of a single payment by B, A agrees to pay to him an annuity for a period of years. The legal nature of such a contract is beyond question. The property in the sum paid by B passes absolutely to A. No relationship of debtor and creditor with regard to that sum is ever constituted. The sum as a sum ceases to exist once it is paid. Its place is taken by A's promise to pay the annuity, and B's only right is to demand payment of the annuity as it accrues due. If A repudiates the contract, B may sue for damages, the measure of damages being the sum of the payments still remaining to be paid, subject to discount. Is it permissible, then, to look behind the legal nature of the transaction and inquire into its financial nature ? If this is done, it is at once apparent that the annual payments are calculated on the basis that, at the expiration of the period of the annuity, B will have received an amount equal to the sum which he paid, together with a sum in respect of interest, for it is on that basis that in such a transaction the amount of the annual payments is calculated. That this is so will be self-evident from the figures themselves. It may even be stated in terms. The financial result of the transaction is, therefore, clear. At the end of the period, B will have received an amount equal to his capital plus a certain addition for interest and, if each annual payment is charged with tax, he will in one sense be paying tax on capital. Nevertheless, it has throughout been assumed by the courts that such payments are liable to tax : *Coltness Iron Co.* v. *Black* (4) at p. 339, *Jones* v. *Inland Revenue Comrs.* (5), at p. 716, and *Perrin* v. *Dickson* (2), at p. 129. The reasoning in *Scoble's* case (1) seems to be based upon the same view.

In *Perrin* v. *Dickson* (2), on the other hand, this court felt itself at liberty to hear extrinsic evidence as to the method of calculating the payments which fell to be made, and, upon the facts so ascertained, coupled with a particular term of the contract, to hold that they were of a capital nature. I must confess that I find the reasoning of the judgments in that case difficult to follow. In the events which happened, the liability to make the annual payments became effective, and, in that aspect of the matter, the case did not differ from the ordinary case of the purchase of an annuity for a period of years. The method of calculating the annual sums was apparently regarded as of importance, but it can scarcely have been regarded as decisive, because the same method is used in the ordinary case of an annuity for a period of years, and P. O. LAWRENCE, L.J., at any rate did not regard himself as deciding that such an annuity would not be taxable [p. 627]. The other important element in the case was the undertaking of the insurance company to repay, in an event which did not happen, the whole or part (as the case might be) of what had been paid by way of premium. This seems to have led the court to regard the whole transaction as being similar to that of a loan A repayable by instalments or (in one event) in a lump sum. My difficulty here is that the transaction certainly was not a loan transaction, although I could better have understood an argument to the effect that it was a transaction which, in the event which did happen, was the purchase of an annuity, and, in the event which did not happen, was in substance the B repayment of the whole or part of what had been paid.

If the law were that, in the ordinary case of an annuity for a term of years, the nature of the financial calculation involved stamped part of the payment as a capital payment, leaving only the interest element to be taxed, on the ground that an annuity is taxable only in so far as it is a C profit, the position would be simple, and perhaps not unjust. In truth, there is a basic distinction between such an annuity and a life annuity, since, in the latter case, the sum of the payments which fall to be made may prove to be less or greater than the sum paid by the annuitant, while, in the former case, it will be the same as the amount paid together D with an addition for interest. Upon this basis, *Perrin's* case (2) would have been a clear one. However, I do not feel myself at liberty in this court to adopt any such principle. I feel bound to regard the purchase of an annuity of the kind to which I have referred as the purchase of an income, and the whole of the income so purchased as a profit or gain, E notwithstanding the way in which the payments are calculated. The sum paid for the annuity has ceased to have any existence, and the fact that, at the end of the annuity period, the recipient will have received an amount equal at least to what he paid I feel bound to treat as irrelevant. Nor do I think that it can make any difference if this result is stated on F the face of the transaction. *Perrin's* case (2) decides at any rate that the absence of such a statement cannot prevent the annual sums paid from being capital, since extrinsic evidence was admitted. It appears to me to follow that the presence of such a statement cannot prevent them from being income.

G I need not set out in detail the terms of the present contract. It bears upon its face statements to the effect that the result of its operation will be that the annual payments made under it will, in the aggregate, amount at the least to the sum paid by Sothern, while, if Sothern were to live long enough, they would exceed it. However, the contract is in H reality a contract to pay an annual sum to Sothern during his life, with the added provision that, in a certain event, the payments will continue annually until an ascertainable date is reached, that date being fixed by reference to the amounts paid to Sothern in his lifetime. In other words, the contract is to pay an annual sum for an ascertainable period of years or for the period of Sothern's life, whichever may prove to be the longer.

There is no debt, nor is there anything which can properly be described as analogous to a debt. The sum paid by Sothern has gone once and for all. The reference to it in the contract is not inserted for the purpose of putting a term to a liability which is throughout the same—namely, a liability to pay an annual sum. During Sothern's life, the sums paid to him were payments of a life annuity. In the events which have happened, further annual payments fell to be made for a definite period, and the fact that this period was ascertained by reference to the capital sum paid by Sothern and the amounts received by him during his life cannot, in my opinion, make these further payments anything different from the ordinary payments of an annuity for a fixed term. Sothern purchased an income, and the capital amount which he paid came into the matter only for the purpose of defining the period during which that income was to be paid. I do not find anything in *Perrin's* case (2) which persuades or compels me to come to a different conclusion. Lawrence, J., from whom I am respectfully differing, thought that the capital sum paid by Sothern never ceased to exist, and that the contract in express terms guaranteed that the capital invested should be refunded or returned. I do not take this view. It seems to me that the capital sum did cease to exist once it was paid, and that the so-called guarantee was an undertaking not to refund a capital sum or any part of a capital sum, but to continue annual payments for an ascertainable period. The view taken by Lawrence, J., would appear to lead to the result that every annuity payable for a period of years would escape taxation if it were pointed out upon the face of the contract that, at the conclusion of the annual payments, the annuitant would have received sums amounting in the aggregate to the sum or sums which he had paid for the annuity, together with an allowance for interest. In my opinion, the appeal should be allowed.

Clauson, L.J.: The contract in question in this case was made by Sothern on Dec. 24, 1928, apparently in New York, and the company's payments thereunder were to be made in New York. The contract is in a form unfamiliar in this country, but may be summarised as follows. In consideration of a payment of $65,243 by Sothern to the company, the latter became bound to pay $6,510 to Sothern on the first and each subsequent anniversary of the date of the contract during his life, and like payments were to be made after his death up to an aggregate of $65,243. If the total annuity payments made during his lifetime should fall short of that sum, the payments were to be made to a named beneficiary, if living, or, after the death of both Sothern and the named beneficiary, to the executors of the survivor. Sothern might change the beneficiary during his own lifetime. After the contract had been in force for two full years, Sothern had the right to surrender the contract and receive the commuted value (discounted at 4 per cent. compound interest) of the future payments necessary to make up the total payments by the company to the figure of the original consideration—namely, $65,243.

Sothern died on Dec. 28, 1933, having, according to the stated case, received from the company under the contract $26,040—namely, four annual payments of the agreed sum of $6,510. Since the death, the company has made annual payments to Mrs. Sothern-Smith, the beneficiary named by Sothern, of $6,510, presumably up to the figure of $65,243, which, in the event (which had happened) of Sothern's death in 1933, is the limit of the company's liability. It was agreed that it was unnecessary to discuss whether, according to the law governing the contract, Mrs. Sothern-Smith could have sued the company for these payments, whether alone or with the concurrence of her brother's personal representatives.

The case for the Crown, which commended itself to the special commissioners, was that these payments to Mrs. Sothern-Smith were taxable as annuities. For Mrs. Sothern-Smith, it was contended (and this contention commended itself to Lawrence, J.) that the payments made to her were annual instalments of a fixed capital sum in respect of which the company became indebted to her under the contract on the death of the contracting party. It was not necessary to decide whether the payments made under the contract to Sothern during his life were chargeable to income tax as annuities. From the wording of cl. 9 in the special case, I should gather that the special commissioners regarded all the annual sums payable under the contract as falling within the description of annuities, and accordingly chargeable to income tax. Lawrence, J., refrained from dealing with any question arising upon the sums paid by the company to the original contracting party.

Questions similar to the present have been before the courts on many occasions, but the principles to be applied in considering whether or not, in a particular case, periodical payments are chargeable to tax under the Acts are well-established, though not always easily applicable to the particular circumstances. I do not propose to examine the earlier authorities, but merely to take the statement of these principles as enunciated in this court in *Perrin* v. *Dickson* (2). In delivering judgment in that case, P. O. Lawrence, L.J., after referring to *Foley* (*Lady*) v. *Fletcher* (3) and *Scoble's* case (1), said, at p. 122 :

> The principle upon which both these cases were decided is that it never was the intention of the Income Tax Acts to tax capital as if it were income, with the result that, even although a contract may provide for the payment of annual sums of fixed amount and may call such payments "an annuity" the court will in each case inquire into the real nature of the transaction, and if it appears that in fact part of such sum represents payment of capital, such part will not be chargeable with income tax. Both these cases, however, distinctly recognise that in the case of a simple purchase of an annuity in consideration of a money payment the full amount of the annuity is chargeable with income tax. The distinction which is apparently drawn in these cases is between the purchase of an annuity for a fixed term in consideration of the payment of a sum of money, and a contract to pay an annuity in consideration of the conveyance of land or other property . . .

As I understand him, P. O. Lawrence, L.J., there intends to point out that the annuity first mentioned will be chargeable to income tax, while that next mentioned will not.

Applying to the present case this statement of the principles applicable, I think that the only possible conclusion is that the payments made by the company under the contract are all taxable. It seems clear that, if the contract had merely been to pay $6,510 for the number of years and the fraction of a year which were requisite for making up the total payments to $65,263, this would create a taxable annuity. The addition to such a contract of a further liability to pay the same nominal sum to the contracting party for the rest of his life if he should survive that period surely cannot alter the character of the payment, especially when it is borne in mind that no one has ever doubted that a contract to pay an annuity for a period measured by life, whether in consideration of a lump sum down or of a series of successive periodical payments (usually called premiums), must be taken to be an annuity chargeable to tax. The view I have expressed was, I understand, the view taken by the special commissioners.

The first line of attack made on this position by counsel for Mrs. Sothern-Smith was to argue boldly that the term "annuity" in the Acts meant, and meant only, "life annuity," and he pointed out that the present contract involved obligations on the company which were not terminated by the falling of a life, if the life fell before the period when the sums paid by the company reached the figure of the original cash consideration. It seems to me to be a sufficient answer that, if "annuity" in the Act means life annuity, there was a short and conclusive argument available both in *Foley* (*Lady*) v. *Fletcher* (3) and in *Scoble's* case (1) to defeat the claim that the periodical payments in question in those cases, which had no reference to life, were taxable as annuities, and the elaborate arguments and judgments in those two cases were superfluous and unnecessary.

There was, however, a further, and, if I may say so, a far more plausible argument put forward, and it was as follows. It was said that, if the premiums or the sum of the premiums paid by the so-called annuitant must, under the terms of the contract, in any event be returned to him, that circumstance must be taken to show that the transaction is not the purchase of an annuity, but is a mere investment of capital money with the company, to be repaid in due course, with, in certain events, interest or other benefits. The payments made by the so-called annuitant were, it was said, capital, of which it was not true to say that it never had ceased to exist. It retained throughout its character of capital which passed away for a period from the so-called annuitant, but was in due course returned to him. It was a mere loan to the company repayable on terms, and the sums paid (or rather, it was said, repaid) to the so-called annuitant were, to the extent of the sums paid by him, payments (or rather repayments) of capital. Any moneys in excess of that amount paid under the contract might well be profits and taxable. In my judgment, it is not possible to treat the present contract as one of mere investment. It will be observed that, if the contracting party dies before the time when the total amount of the $65,243 has come back to him, or to those claiming under him, in the form of annual payments, the net result is that he and those claiming under him have been out of the money for the period (roughly 10 years), with no allowance of interest at all. That does not look much like an investment from the contracting party's point of view. Thus, if the contracting party lives beyond the same period, the company comes under an obligation, limited only by the duration of the contracting party's life, to keep up the annual payments. Such an obligation is, of course, an ordinary incident of an annuity contract, but it seems wholly alien to a mere arrangement for accepting money on loan. The truth is that the transaction in the present case contains none of the characteristics of a contract of loan in which capital is handed over to be returned as capital. The $65,243, so far as the contracting party is concerned, has, to use the language of WATSON, B. (in *Foley* (*Lady*) v. *Fletcher* (3), at p. 785), gone and ceased to exist, the principal having been converted into an annuity. The only continuing relation between the annuity and the vanished capital sum is that the amount of the vanished sum is arbitrarily taken to measure the minimum period for which the annuity is to run.

It was strongly urged that the fact that the repayments made by the company to the contractor in *Perrin* v. *Dickson* (2) were held not to be chargeable to income tax made it necessary for this court to hold the like in the present case. The decision in *Perrin* v. *Dickson* (2) was based on the fact that each member of the court was satisfied that in that case the sums paid by Bishop Perrin were mere investments of capital received and in due course repaid by the company, and that the transaction was, as I understand their Lordships, merely one of a deposit of a fund with the company on the terms that the deposit should be repaid, in one event, without interest, but, in the event of the whole scheme working out as anticipated, with compound interest calculated at 3 per cent. If that is the true view of the contract in question in *Perrin* v. *Dickson* (2), no doubt the repayments were not taxable, but only the compound interest, but it seems to me impossible to take a like view of the contract in the present case, for the reasons I have explained above. Whether the view of the nature of the contract taken by the court in *Perrin's* case (2) was consistent with the circumstance that, if Bishop Perrin failed to keep up the periodical advances or premiums which he was bound by the contract to make, he had no contractual right to recover them is a question which might, if the case had to be considered in a court which had power to overrule that case, be a matter for serious consideration, as also whether the difficulty occasioned by the absence of such a contractual right could be properly treated as surmounted by evidence that it was the practice of the company in such circumstances to repay the advances or premiums. In whatever way these questions may be resolved by a court which has power to overrule the decision in *Perrin* v. *Dickson* (2), there remains the crucial distinction between that case and the present that in that case the company's liability could never exceed the amount of the premiums with the compound interest at 3 per cent., while in the present case the contract involved the company in a possible liability which, if Sothern lived for an unexpected number of years, might exceed the original payment and a reasonable rate of interest thereon by a very large figure. The existence of such a liability in the payee of the original capital sum appears to me to make the transaction differ crucially from a mere transaction of deposit or investment of a capital sum to be returned in due course as a capital sum. The transaction must, in my view, be treated as a parting with a capital sum as consideration for the grant of a number of periodical payments, or, in other words, for the grant of an annuity. I can thus find nothing in *Perrin's* case (2) which would induce, still less compel, me to hold that the view which I have formed and stated above of the nature and effect of the contract in question in the present case is otherwise than correct. For these reasons, I am of opinion that the decision of the special commissioners was correct, and that the order of LAWRENCE, J., reversing their decision should not be upheld. Accordingly, in my view, the appeal of the Crown should be allowed, with the usual results.

GODDARD, L.J.: The difficulty which I have felt in this case is to determine whether it is distinguishable in principle from *Perrin* v. *Dickson* (2), a decision which is binding on this court. The fine distinction between an annuity properly so called for tax purposes and an annual payment which is in truth a capital payment, whether or not in discharge of a pre-existing debt, has repeatedly been emphasised, and no sure or simple test has been, or can be, laid down for the solution of this problem. The only principle which I can deduce from the cases is that the court must have regard to the true nature of the transaction from which the annual payment arises, and must ascertain whether or not it is the purchase of an annual income in return for the surrender of capital. If it is the purchase of an income, it is taxable. If it is a capital payment, it is not. In the latter case, however, if the annual sum represents a payment, or a return of capital, coupled with interest, the sum may be dissected and tax charged on so much as represents interest. In the case of a whole life annuity, the sum paid is not in truth a return of capital plus interest. The annual payment is calculated on the grantee's expectation of life. He is to receive during his life an annual sum considerably in excess of the normal interest which he would obtain on an investment, while the grantor takes the risk of the life being prolonged beyond a period which will yield a profit to him on the transaction. The grantee retains no interest in the capital once it has been paid. It becomes the property of the grantor. The present case as between the company and Sothern is, in my opinion, one of an ordinary life annuity with an additional benefit attached, the company agreeing that in no event will they pay less than the amount of the capital they received from the annuitant. I find it difficult to see why a payment to be made after his death to his nominee or to his executors, if the nominee should also have died, or if they had been nominated as beneficiaries, should change in character or quality, becoming capital, and not income, merely because the measure of the payment or payments is limited to an amount which, added to what has already been paid to the grantee, will be equivalent to the amount originally paid by him to secure the income. In *Perrin* v. *Dickson* (2), it was found that the sum to be paid to the parent for the education of his child was, if the child survived for the whole period, the amount of the premiums plus 3 per cent. compound interest. The contract provided that, if the child died, the parent was to be paid the total amount of the premiums paid without interest, less any sum which might already have been received. The court held, as I understand the decision, that the true nature of the transaction was no more than the accumulation or saving by the parent of a fund at compound interest, to be applied, when the time came, for the education of the child, or to be returned to him without interest in the event of the earlier death of the child. On that view of the facts, the transaction was in no sense an annuity, and is quite different in quality from that which we are now considering. The opinion which I have formed makes it unnecessary to consider what effect, if any, the decision in *Perrin's* case (2) may have on terminable annuities. Obviously the transaction was closely akin to the grant of such an annuity, and the court held that only so much of the payments as represented interest was taxable. It may yet have to be decided whether that principle must be applied to all cases of deferred terminable annuities, but, as, in my opinion, this is not truly a case of a terminable, but of a whole life, annuity, with an added benefit, I need express no opinion upon the question. I think that the decision of the special commissioners was right, and should be restored.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Scott & Son* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

MERCHANTS' AND MANUFACTURERS, INSURANCE CO., LTD. *v.* HUNT AND OTHERS.

[COURT OF APPEAL (Scott, Luxmoore and du Parcq, L.JJ.), **November 13, 15, 27, December 19, 1940.**]

Insurance—Motor insurance—Proposal—Misrepresentation in proposal form—Action by insurance company for declaration—Right of third parties to strict proof of falsity of representations—Road Traffic Act, 1934 (c. 50), *s.* 10.

By a policy dated Sept. 1, 1938, the plaintiffs insured the defendant C. H. against third-party risks in respect of accidents arising out of the use of his motor car. It was provided by the policy that the truth of the statements and answers in the proposal should be a condition "precedent to any liability of the company to make any payment" under the policy, and also that nothing in the policy should "affect the right of any person indemnified by this policy or of any other person to recover an amount under or by virtue of the Road Traffic Act, 1934, ss. 10, 12." The proposal form, which was incorporated in the policy, contained, *inter alia*, the following questions and the answers thereto given by C. H.: (1) Have you or any person who to your knowledge A will drive the car ever been convicted of an offence in connection with a motor vehicle or motor cycle, or is any prosecution pending? Answer: No. (2) Will the car be driven by any person under 21? Answer: No. Both answers were in fact untrue, since (*a*) C. H.'s son, J. H., a person who to his knowledge was likely to drive the car, had been convicted of 4 motoring offences, and (*b*) J. H. was then only 17 years of age and B had held a licence for only 6 months. Two persons were injured as a result of a collision with the car when it was being driven by J.H., and brought an action for damages against C. H. and J. H. The insurance company then claimed for a declaration under the Road Traffic Act, 1934, s. 10 (3), that they were entitled to avoid the policy on the ground that it was obtained by non-disclosure of material facts. The evidence in support of the claim for a declaration consisted of (i) an admission C by J. H. to the managing clerk of the solicitors acting for the insurance company that his age was 17½ years, and that he had been convicted of 4 motoring offences, and (ii) an admission by C. H. to the claims manager of the insurance company that the above information given by J. H. was true:—

HELD: the injured persons, having been made defendants in the action, were entitled to have the age of J. H. and any convictions against D him strictly proved. The evidence tendered in support of the declaration being inadmissible, the action for a declaration failed.

Decision of STABLE, J. ([1940] 4 All E.R. 205) *affirmed on other grounds.*

[EDITORIAL NOTE. At the trial of the action, it was held that the admissions of the insured party and his son, though strictly only evidence against themselves, E could be made the basis of a declaration which would be binding on all parties to the action. The Court of Appeal have wholly disagreed with this holding, and all members of the court are emphatically of opinion that the injured persons, who had been made parties to the action for a declaration, were vitally interested in requiring that the falsity of the representations relied on by the insurance company F should be strictly proved. The appeal having failed on this point alone, the questions arising upon the contracting out clause inserted in the policy were not dealt with by the Court of Appeal, and the effect of such a clause remains to be dealt with—at any rate, by the Court of Appeal—upon some future occasion.

AS TO DECLARATION THAT POLICY AVOIDED, see HALSBURY, Hailsham Edn., Vol. 18, pp. 564, 565, para. 914; and FOR CASES, see DIGEST, Supp., Insurance, G Nos. 3217 mm—3217 tt.]

Case referred to:

(1) *Zurich General Insurance Co.* v. *Livingstone*, [1940] S. C. 406; Digest Supp.

APPEAL by the plaintiffs from a judgment of STABLE, J., dated Sept. 3, H 1940, and reported [1940] 4 All E.R. 205, where the facts are fully set out.

H. D. Samuels, K.C., and *Montague Berryman* for the appellants.

Gerald A. Thesiger for the first and second respondents.

D. N. Pritt, K.C., and *M. Turner-Samuels* for the third and fourth respondents.

SCOTT, L.J.: This appeal concerns a policy of motor car insurance, dated Sept. 1, 1938, issued by the appellant company under the Road Traffic Act, 1930, s. 36, insuring the respondent, Charles Hunt, and the class of persons therein mentioned, against third-party liabilities. The appellants ask for a declaration, following the words of the Road Traffic Act, 1934, s. 10 (3), that at the material date they were:

> . . . apart from any provision contained in the policy, entitled to avoid the policy on the ground that it had been obtained by the non-disclosure of material facts, or by representations of facts which were false in material particulars.

If they obtained such a declaration, they would escape the liability, imposed upon them as insurers by sect. 10 (1), to pay the amount of damages, interest and costs for which judgment might be given in an action brought against the respondents Hunt by the respondents Thorne, who had been injured, as they alleged, by the negligent driving of the insured car, owned by the respondent Charles Hunt and driven by the respondent John Hunt, an infant and the son of the respondent Charles Hunt, who, on the occasion of the accident which injured the Thornes, was driving the car with his father's permission, and was, therefore, within the class of persons protected by the policy, though not a party to it.

Before I consider the facts of the case, or the relevant terms of the policy, it will be convenient to quote the essential provisions of the Road Traffic Act, 1934, upon which the whole appeal turns. Sect. 10 (1) provides as follows:

> . . . if a judgment for damages for personal injuries or death is obtained against a person insured by such a policy as is required by sect. 36 of the 1930 Act, then, notwithstanding that the insurer may be entitled to avoid . . . the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment the damages, interest and costs awarded.

This proviso thus gives to plaintiffs who obtain judgment in an action for damages caused by the negligent driving or management of a motor car a direct right of action against the insurance company who issued the policy required by the 1930 Act, although the plaintiffs in the negligence action are no party to the policy, and although the policy is voidable at the insurer's instance. From the extreme hardship which might otherwise result from subsect. (1), subsect. (3) gives the insurer a conditional means of escape. If he discovers that he was induced to make the contract of insurance by some material non-disclosure or misrepresentation which, by ordinary insurance law, and not merely by reason of some special stipulation which he has put in his form of policy, entitles him to avoid the contract, he may obtain a declaration to that effect from the court, and he will then be free from the statutory liability to the injured third party. This legislation was obviously intended to effect, *inter alia*, a fair compromise between the two desirable but conflicting objects—namely, on the one hand that of protecting the public from the danger of impecunious tortfeasors on the roads, and, on the other hand, that of avoiding the injustice of putting on a wholly innocent and misled insurer the whole pecuniary burden of a policy which, neither in law nor in equity, is his policy. However, it would have been unfair to confer this relief unconditionally. There was an obvious danger of the injured party being deprived of the pecuniary safeguard which was the subject of subsect. (1) through the possibility of the policy being avoided in proceedings under the first part of subsect. (3) without his A knowledge, and even by collusion between the insurer and the insured. It was essential that he should have notice of any such action by the insurer, and also that he should be given the right to appear in it and there defend his rights. Both the requisites are met by the proviso to subsect. (3), which in effect creates two conditions precedent to the existence of B the insurer's right to get his declaration under the first part of subsect. (3). The third party gets full notice of the ground of the insurer's claim, and is given an unqualified right to become a party in the insurer's action, and it is particularly to be noted that he is given all the rights of a party to an action without any qualification upon them. C

It is out of this statutory position that the disputes which led to the appeal arose. The relevant facts are few. The insured person was the respondent Charles Hunt. His son, John Hunt, a young man alleged to be under 17½ at the time, on Oct. 8, 1938, was driving his father's car, with his father's permission, as he often did, and it was his negligence D which was alleged to have caused the accident. Both the Thornes were injured. On Oct. 31, a signed statement was obtained from John Hunt by a solicitor acting for the appellant company, in which he made statements affecting the truth of certain answers to questions in the proposal form signed by his father. The appellants at once raised the question E of misrepresentation. On Nov. 4, Charles Hunt called at the appellants' office and had an interview with the company's claims manager. The Hunts' solicitors wrote on Nov. 5 denying the allegation, and by a letter on Nov. 18 from their solicitor they claimed to exercise an option in the policy to cancel it. To this the appellants replied challenging F their right to do so. The parties were thus at arm's length, taking opposite views.

On July 17, 1939, the Thornes issued their writ against the Hunts. On Oct. 17, 1939, just within the 3 months allowed, the appellants' solicitors gave to the Thornes the statutory notice under sect. 10 (3) G specifying the representations of fact alleged to be false in material particulars, and alleging also non-disclosure of the same material facts. On the same day the appellants issued their writ.

Two declarations were asked for in the statement of claim—namely, H (i) a declaration that they are, and have at all material times been, entitled to avoid the policy of insurance dated Sept. 1, 1938, on the ground that that policy of insurance was obtained by the non-disclosure of material facts and/or by the representation of facts which were false in some material particulars, and (ii) a declaration that they are under no liability to indemnify the respondents Charles Hunt and John Hunt, or either of them, in respect of any damages or costs which may be awarded against them or either of them in the action brought against them by Percy Thorne and Matilda Thorne. The Thornes in due course gave notice that they desired to be made parties in the company's action, and at the instance of the company, by order dated Jan. 5, 1940, they were added as defendants, and the writ was accordingly amended.

The judge heard the case on Aug. 30, 1940, and Sept. 2, 1940, and gave judgment on Sept. 3, 1940, holding that two representations had been made which were false in material particulars, and which would have entitled the plaintiffs to their declaration but for a particular clause in the policy upon which he gave judgment against them. The form of policy was typical of the elaborate and overloaded documents used in motor insurance at the present day, which few insured persons understand and still fewer read, but it satisfied the requirements of the Road Traffic Act, 1930, s. 36. It recited and incorporated the "proposal" and "declaration" of the assured, made them "the basis of the contract," and incorporated them in the policy. It then granted the insurance, subject to the following provisoes, which I quote *in extenso*, except for the reference to the Acts of Northern Ireland :

> (*a*) That the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the company to make any payment under this policy ; (*b*) That nothing in this policy or in any indorsement thereon shall affect the right of any person indemnified by this policy or of any other person to recover an amount under judgment by virtue of the provisions of the Road Traffic Act, 1930, s. 38 : Road Traffic Act, 1934, ss. 10, 12.

There follows after the provisoes this clause :

> But the insured shall repay to the company all sums payable by the company which the company would not have been liable to pay but for the said provisions of the above-mentioned Acts.

The policy was for a year from Sept. 1, 1938. Condition (1) called for immediate notice of an accident. Condition (6) made the contract personal to the insured, and condition (8) was as follows :

> The due observance and fulfiment of the terms, provisions and conditions of this policy, and of any indorsement thereon, insofar as they may relate to anything to be done or complied with by the insured, and the truth of the statements and answers in the said proposal, shall be conditions precedent to any liability of the company to make any payment under this policy.

The only misrepresentations established in the view of the judge were the answers to Question 7 (*d*) and to Question 8 (*a*) in the proposal form :

> 7 (*d*) Have you or any person who to your knowledge will drive the car ever been convicted of an offence in connection with a motor vehicle or motor cycle, or is any prosecution pending ?—No.
>
> 8 (*a*) Will the car be driven by any person under 21 ?—No.

Although the judge has not found that the answer, "Myself," to Question 7 (*a*), "Who will usually drive the car ?" is false, he has held that, at the time of making the declaration, Charles knew that his son John, whom he had taught to drive, would often drive it, and that his answer to Question 8 (*a*) was, therefore, false. In regard to Question 7 (*d*), it was alleged that John had been convicted of four driving offences, but of that fact his father, when signing the declaration, was said not to have been aware. The judge, however, following the views on construction expressed in *Zurich General Insurance Co.* v. *Livingstone* (1), where a similar question arose for decision, held that the answer "No" imported an assertion by the father that he knew the fact to be as stated—that is to say, that his son, who he knew would often drive the car, had never been convicted. I agree with the judge and with the Scottish judges in that construction.

But for the second of the two provisos on the face of the policy, which I have quoted, the judge would have given the plaintiffs their declaration under sect. 10 (3), but he held that the second proviso was ambiguous, and, therefore, must be construed against the plaintiffs, who had caused it to be put into the contract, and he held that, so interpreted, it was an express abandonment by the company of the right conferred upon it by by subsect. (3) to escape from the liability imposed upon it by subsect. (1). He therefore refused the declaration and gave judgment for the defendants.

The company appealed, submitting, *inter alia*, that the clause did not, and could not, bear any such meaning. Counsel for the two Hunts did not expressly contend that it could, but answered with this argument. The duties of disclosing *all*, or of not misrepresenting *any*, material facts are, he submitted, not duties existing at common law or in equity outside the insurance contract. Each of them is just an implied condition of the contract, and is a warranty in the insurance sense. It imports that full disclosure has been duly made, or that all the material representations inducing the contract were true, with the result that the breach of either condition prevents the contract from becoming effective, and entitles the aggrieved party to avoid it. Being an implied term, it will, said counsel for the two Hunts, be necessarily superseded by any express term covering the same ground as, or being inconsistent with, the implied term. The express conditions, contained in proviso (*a*) and condition 8, which I have already quoted, are those upon which he relied as superseding his implied conditions. The first answer to his argument is that, whereas his implied conditions go to the avoidance of the whole contract, his two express conditions in the policy leave the contract standing, and only negative liability attaching for payments under it. However, I am not satisfied that his argument on principle is sound. I realise that there are several reported cases in which judges have, in the course of their judgments, expressed an opinion that the duty of disclosure may be regarded as resting on an implied term, but I do not know of any case where the point has come up for actual decision. On principle, it seems plain that the equitable jurisdiction avoiding a contract for misrepresentation cannot rest on such a foundation, and I agree with what LUXMOORE, L.J., says about that in his judgment, which I have had an opportunity of reading. Even the common law duty of disclosure I find difficult to explain fully on the theory of its resting only on an implied term of the contract. If it did, it would not arise until the contract had been made, and then its sole operation would be to unmake the contract. Although the question has not been decided judicially, it is worthy of note that the Marine Insurance Act, 1906, ss. 17, 18, seems to treat the twin duties of disclosing all the material facts and of misrepresenting none as existing outside the contract, and not as mere implications inside the contract, for that Act was intended to be declaratory of the common law, and I see nothing in the language of these particular sections to justify interpreting them as being anything but declaratory.

The language of the Road Traffic Act, 1934, s. 10 (3), also reads as if Parliament were there making the same assumption, for the declaration which the insurer is empowered to obtain a declaration that :

> . . . apart from any provision contained in the policy, he is entitled to avoid the policy on the ground of non-disclosure or misrepresentation.

The subsection does not direct the insurer to rely on a condition implied in the contract which will prevent its operation, but, for two reasons which I will now state, I do not think that it is necessary in the present appeal actually to decide the legal question thus raised by counsel for the two Hunts.

Counsel for the two Thornes took the point that the judge, in admitting the signed statement by John Hunt and the oral evidence given below of what Charles Hunt had said to the claims manager of the company at the interview on Nov. 4, had acted on evidence of the falsity of Charles Hunt's answers to Questions 7 (*d*) and 8 (*a*), which was not admissible against the two Thornes. At the trial, the Hunts were not called as witnesses, and there was no proof other than the above of the falsity of those answers. We were told that counsel for the two Thornes had objected to the admissibility of that evidence as against the Thornes, but that the judge had overruled the objection. Counsel for the two Thornes submitted before us that, as his clients were defendants, they were entitled to all the rights of defendants, the more so as they were, or might be, vitally interested in resisting the appellants' claim to a declaration.

Counsel for the appellants, on whom we at once called for a reply to this argument, submitted that, on its true interpretation, subsect. (3) contemplated that the only issue for trial in an insurer's action for a declaration would be that which arose between insurer and insured, the sole parties to the contract, that a declaration against the insured alone was intended, and that such a declaration was intended to be binding against all parties claiming under a judgment for damages for death or personal injuries obtained by them against the insured party to the contract or other persons coming within the indemnity provided by the terms of the policy. To our question as to why Parliament in the subsection had given an absolute right to such third person to be made a party to the insurer's action, counsel for the appellants was unable to give any reply which I was able to understand. In my opinion, the necessary implication of the word " party " in the subsection is that he is entitled to be made a co-defendant under R.S.C., Ord. 16, and that he then acquires all the rights of a defendant. In the present case, the Thornes,

on exercising that election, were made co-defendants at the instance of the plaintiff company. It follows that they were then entitled to insist on the case being properly proved against them, and to make all proper objections to the admissibility of evidence, and, as the plaintiffs' case was not so proved, they were entitled to judgment with costs. The appeal must, therefore, be dismissed with costs as against the Thornes. A
The action being dismissed as against the Thornes, it would, I think, be an improper exercise of discretion on our part to grant the declaration against the Hunts, even if we had power to do so, on which I postpone forming any opinion until a case necessarily raising that question arises for decision. The appeal, will, therefore, though for reasons differing B
from those of the judge, be dismissed with costs as against the two Hunts as well as against the Thornes.

LUXMOORE, L.J.: On Sept. 1, 1938, one Charles Hunt filled in and signed a proposal form and declaration requesting the Merchants' and C
Manufacturers' Insurance Co., Ltd. (hereinafter called the company), to issue to him a policy of insurance in respect of (among other things) his liability to third-party risks in respect of a Vauxhall motor car belonging to him and described in the proposal form. The period of the insurance was for one year from Sept. 1, 1938, to Sept. 1, 1939. The D
proposal and declaration contained a number of questions which were answered by Charles Hunt. Although a number of these questions and the answers thereto were referred to during the hearing out of which this appeal arises, it is necessary to refer to only two of such questions—namely: E

> 7 (*d*) Have you or any person who to your knowledge will drive the car ever been convicted of an offence in connection with a motor vehicle or motor cycle or is any prosecution pending?—No.
>
> 8 (*a*) Will the car be driven by any person under 21?—No.

The declaration contained the following statement:

> I hereby warrant the truth of the above statements and I declare that I have F
> withheld no information whatever which might tend in any way to increase the risk of the company or influence the acceptance of this proposal.

The proposal was accepted by the company, and a policy of insurance was issued to Charles Hunt in accordance therewith on Sept. 5, 1938. The policy so issued provided, among other things, that, subject to the G
terms, exceptions and conditions contained therein and "any indorsement thereon," the company would indemnify as thereinafter mentioned Charles Hunt (therein described as the insured). The policy sets out, under the heading "Indemnities under this policy," the indemnities afforded thereby. These indemnities, so far as material to be stated, H
included, under the heading "Section 1: Liability to Third Parties," a provision that the company would indemnify the insured, in the event of accident caused by or through or in connection with the motor car in Great Britain and certain other specified territories, against all sums, including claimant's costs and expenses, which the insured should become

legally liable to pay in respect of the death of, or bodily injury to, any person, except where such death or injury arose out of and in the course of the employment of such person by the insured, and that, in the terms of, and subject to the limitations of, and for the purposes of, the section, the company would treat as though he were the insured any person who was driving the motor car on the insured's orders or with his permission, subject to certain provisoes which are not material to be stated. The policy also provided that the proposal and declaration made by Charles Hunt for the policy in question should be the basis of the contract of insurance thereby effected, and should be deemed to be incorporated therein, and that the truth of the statements and answers in the proposal should be conditions precedent to any liability of the company to make any payment under the policy. It further provided that nothing in the policy should affect the right of any person indemnified thereby, or of any other person, to recover an amount under or by virtue of the provisions of, among other enactments, the Road Traffic Act, 1934, s. 10, but that the insured should repay to the company all sums paid by it which the company would not have been liable to pay but for the provisions of (among other enactments) the Act and section above-mentioned. The conditions contained in the policy included condition 8, which provided, among other things, that the truth of the statements and answers in the proposal should be a condition precedent to any liability of the company to make any payment under the policy. The policy issued by the company to Charles Hunt admittedly covers such liability as is required to be covered by the Road Traffic Act, 1930, s. 36 (1) (*b*).

The company in due course issued to Charles Hunt a certificate of insurance in accordance with the provisions of subsect. (5) of the same section. This last-mentioned subsection provides, among other things, that a policy of insurance shall be of no effect for the purposes therein stated unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate of insurance in the prescribed form. On Oct. 8, 1938, the insured car, whilst being driven by John Hunt, the son of Charles Hunt, with the latter's consent, was involved in an accident in which the respondents Percy Thorne and Matilda Thorne his wife (hereinafter referred to as the Thornes) suffered severe injuries. On July 7, 1939, the Thornes issued a writ against Charles Hunt and his son claiming damages against them on the ground that the injuries sustained by them were caused by the negligent driving of the motor car by John Hunt. This action has not yet been tried, and is hereinafter referred to as the Thornes' action.

It is provided by the Road Traffic Act, 1934, s. 10 (1), that, if, after the certificate of insurance has been delivered under the Road Traffic Act, 1930, s. 36 (5), to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under subsect. (1) (*b*) of the last-mentioned section (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount in respect of costs and any sum payable in respect of interest. A

Sect. 10 (2) provides that no sum shall be payable by an insurer under the provisions of subsect. (1) thereof in respect of any judgment unless before or within 7 days after the commencement of the proceedings in which the judgment was given the insurer had notice of the bringing of the proceedings, while sect. 10 (3) provides that no sum shall be payable B by an insurer under the provisions if, in an action commenced before or within 3 months after the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, C or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it, provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of subsect. (3) as respects any D judgment obtained in proceedings commenced before the commencement of that action unless before or within 7 days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an E action is so given shall be entitled, if he thinks fit, to be made a party thereto. Sect. 10 (5) provides that in that section the expression "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether or not he will take the risk, and, if so, at what premium and on what conditions, and that the expression F "liability covered by the terms of the policy" means a liability which is covered by the policy, or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.

It is admitted that notice of the institution of the Thornes' action G was given to the company, and, as the result of such notice, the company in its turn on Oct. 17, 1939, some 6 weeks after the expiration of the term covered by the policy, started an action against the Hunts (hereinafter referred to as the company's action) for a declaration in accordance H with the provisions of sect. 10 (3). The notice required to be given by the proviso to the last-mentioned subsection was in due course given to the Thornes, who requested that they should be made parties to the company's action in accordance with the right conferred on them by the proviso. On Jan. 5, 1940, in compliance with such request, the company, on its application, obtained an order in the company's action that the

Thornes should be added as defendants thereto. The writ was subsequently amended in accordance with that order.

By its statement of claim in the company's action, the company alleged that the policy issued to Charles Hunt was issued by the company in reliance by it on the truth of certain representations which were alleged to be false in certain material particulars. These representations are set out in para. 4 of the company's statement of claim, and include the representations contained in Questions 7 (*d*) and 8 (*a*) contained in the proposal and declaration already referred to, and the answers thereto. The company alleged in the alternative that Charles Hunt, by his answers to those questions, failed to disclose facts material to be made known in or about the making of the contract of insurance. The relief claimed by the company was (i) a declaration that the company had at all material times been entitled to avoid the policy of insurance on the ground that it was obtained by the non-disclosure of material facts and/or by the representation of facts which were false in some material particulars, and (ii) a declaration that the company was under no liability to indemnify the Hunts or either of them in respect of any damages or costs which might be awarded against them or either of them in the Thornes' action. It was admitted at the trial that the two representations to which I have referred were made, and that, if they were false, they were material within the definition of that word contained in sect. 10 (5) of the Act, but no admission was made by the Thornes as to their falsity.

The action was tried by Stable, J., who, after considering certain statements made by certain of the witnesses called on behalf of the company, to which I will refer later, held that each of these representations was false, and stated that he would have been prepared to make the first declaration asked for by the company—namely, that the company was at all material times entitled to avoid the policy on the ground that it was obtained by the representation of facts which were false in material particulars—had he not come to the conclusion that, on the true construction of the material section of the Act and of the policy of insurance, the company had expressly contracted out of its statutory right to escape liability in respect of the rights given by statute to the Thornes. The judge therefore dismissed the company's action and ordered the company to pay the costs of the Hunts and the Thornes. The company has appealed from this judgment, and by the notice of appeal asks that a declaration in the form of the first declaration set out in the prayer to its statement of claim should be made against all the defendants, and that, in any event, a declaration should be made against the Hunts that the company is under no liability to indemnify them or either of them in respect of any damages or costs which may be awarded against them or either of them in the Thornes' action.

In opening the appeal in this court, counsel for the company relied on the findings of the judge that the policy had been obtained by the two representations already mentioned, and that each of such representations was a material representation and was false, but he challenged the construction put by the judge on the material section of the Act and on the policy. Counsel for the Thornes claimed that the falsity of neither of the representations had been proved at the trial by evidence which was admissible as against the Thornes. It is agreed that the objection to the admissibility of the evidence which was adduced on behalf of the company was taken at the time when it was tendered, and that the objection was overruled. Logically, this is the first point to be determined on the appeal.

The evidence objected to and relied on by the company to prove the falsity of the two material representations was given by two witnesses. The first was one Wesson, the managing clerk to the solicitors acting for the company in the company's action. He stated that he had an interview with John Hunt on Oct. 31, 1938, and that on that date he took a statement from him which John Hunt signed. The witness produced the original statement. It appears from the statement that John Hunt said that his age was 17½ years and that he had been convicted of four motoring offences, which are specified in the statement. The other witness was one Huckett, who, at the time when the accident took place, was the claims manager of the company. He stated that he had an interview with Charles Hunt on Nov. 4, 1938, that he showed to Charles Hunt the statement signed by John Hunt, and that Charles Hunt in substance admitted that the information given by John Hunt in such statement was true. It is difficult to understand how it could be held that the evidence of either witness was admissible against the Thornes. The Thornes were parties defendant to the action and were vitally interested in requiring that the falsity of the representations relied on by the company should be strictly proved. They were entitled to have the age of John Hunt proved, either by the production and identification of his birth certificate or by the evidence of some person present at his birth, and to have any convictions against him proved by the production of proper certificates of such convictions.

It was argued, however, by counsel for the company (and this argument was accepted by the judge) that, although the Thornes were properly made defendants in the action, because the evidence in question was admissible as between the company and the Hunts, it was wholly immaterial to consider whether, if the proceedings had been simply against the Thornes, or had concerned rights solely invested in them, the evidence would have been inadmissible against them. Obviously, by reason of the provisions of sect. 10 of the 1934 Act, the Thornes are interested in resisting by any proper means the making of the first declaration sought. As defendants, they were, in my judgment, entitled to insist on strict proof of the facts on which alone the right to the declaration could be founded, and I fail to see any ground for holding that the Thornes' rights as defendants are in any way curtailed by anything in the section referred to. On the contrary, the form of the declaration, as stated in the section—namely, a declaration that the insurer is "entitled to avoid the contract "—emphasises the interest of the Thornes in the company's action, for, if that action had been against the Hunts alone on the ground that the policy was issued by the company by reason of false representations made by Charles Hunt, then the relief sought would be, not a declaration in the form stated, but a declaration that the contract was void and ought to be set aside and delivered up for cancellation, for, in such a case, the court would not make a declaration which would leave it to the company to decide whether or not it would avail itself of such a declaration.

I am satisfied that counsel for the Thornes was entitled to object on their behalf to the evidence tendered by the company in support of its claim to the first declaration on the ground that it was inadmissible as against his clients. That being so, whatever may be the proper construction of the material section and the policy, the action, so far as the Thornes were concerned, of necessity failed, because there was no admissible evidence to support the contention that the material representations were, or either of them was, false.

It was argued that, in any event, the company was entitled to have the first declaration made as against the Hunts, even if it were expressed to have no operation as against the Thornes, but, in my judgment, this argument is also unsound. The question whether in any particular case a declaration shall be made in an action is in the discretion of the court. In the present case, if the declaration has no force as far as the Thornes are concerned, it could serve no useful purpose to make it as against the Hunts, for the policy had expired before the company's action was instituted and there was at the date of the trial no possible claim under it in which any third party other than the Thornes could then or thereafter be interested.

It might be that, if the company had asked the court to make the second declaration sought by its statement of claim, it would have been proper for the court to make it, for such declaration arises out of the express terms of the policy—namely, that the truth of, among other statements, those contained in the answers to Questions 7 (*d*) and 8 (*a*) in the proposal form (which the Hunts, so far as they are concerned, have admitted to be untrue) is a condition precedent to any liability of the company to make any payment under the policy to the Hunts by way of indemnity in respect of any judgment which might be obtained against them by the Thornes in the Thornes' action—and such declaration cannot affect anyone other than the Hunts. Such a declaration, however, would in all probability be purely academic, for, if the Thornes should recover judgment in their action against the Hunts, it is practically certain that the Thornes would proceed to enforce it against the company under the provisions of sect. 10 of the 1934 Act, and would not trouble to attempt to enforce it against the Hunts or either of them. In any event, the Hunts have admitted that, in the circumstances, they would not be entitled to resist any claim by the company for repayment to it by the Hunts of any moneys paid to the Thornes under the section.

Counsel for the Hunts put forward an argument to which reference ought to be made—namely, that in no event could a declaration to the effect that the company was entitled to avoid the policy be made on a policy which contained, as this policy does, provisions to the effect that the truth of the statements contained in the answers to the questions in the proposal form was a condition precedent to the company's liability under the policy and the warranty already quoted from the declaration attached to the proposal. He said that the right of an insurer to avoid a policy of insurance for misrepresentation or non-disclosure with regard to a material fact was based in law on implied contract, and that the presence of the express provisions in the policy and declaration excluded any possibility of the implication referred to. He quoted a number of authorities, all of which related to cases of non-disclosure. Whatever may be the decision with regard to non-disclosure, as to which I say nothing, I am satisfied that in a case of positive misrepresentation the right to avoid a contract, whether of insurance or not, does not depend on any implied term of the contract, but arises by reason of the jurisdiction originally exercised by the Courts of Equity to prevent imposition. Further, the provision in this policy that the truth of the answers to the material questions in this policy is a condition precedent to the company's liability to the insurer is a warranty which confers a contractual right on the insurer, and has no reference to the right to set aside the policy, whether for false representations or for non-disclosure. The same criticism applies to the warranty in the declaration. There is no express provision in the policy entitling the company to set the policy aside, whether for misrepresentation or for non-disclosure.

As I have already stated, STABLE, J., held that the company by the policy issued to Charles Hunt expressly abandoned any right it might otherwise have had to avoid the policy on the ground of misrepresentation. The judge came to this conclusion because of the presence in the policy of the provision that:

> . . nothing in the policy or in any indorsements thereon shall affect the right of any person indemnified by this policy or of any other person to recover an amount under or by virtue of the provisions of [among other enactments, the Road Traffic Act, 1934, s. 10].

He said that the policy included the proposal form and declaration and the answers thereto, and that, consequently, he was bound to read the clause as if it said: " Nothing in the answers to any of the questions shall prevent the Thornes, in the event of their obtaining a judgment against the Hunts in the Thornes' action, as persons entitled to recover an amount under or by virtue of the provisions of the Road Traffic Act, 1934, s. 10, from recovering the amount of any such judgment under the policy." Counsel for the insurance company contended that the judge's conclusion was incorrect, because any right conferred on the Thornes by reason of the presence in the policy of the clause to which the judge referred could only remain in existence if the contract were not avoided.

If the company is entitled to avoid the contract by reason of the misrepresentations relied upon, and does so avoid it, the contract and everything in it will cease to have any effect. The section itself provides that the right to avoid the contract for misrepresentation exists "apart from any provision contained in the policy." The argument of counsel for the company seems to me to have considerable force, but, as no argument in support of the judgment was heard on this point, I do not think it right to express any concluded opinion on it. It is sufficient to say that, having regard to the conclusion at which I have arrived on the question of admissibility of the evidence tendered by the company to establish the fact that the misrepresentations were made, I agree that this appeal fails and should be dismissed with costs.

DU PARCQ, J. [read by LUXMOORE, L.J.]: I agree that this appeal should be dismissed. The Thornes were parties to the action. They were properly made defendants. An order affecting his rights cannot be made against a defendant except upon evidence or as a result of his admissions. The Thornes made no admissions. No evidence was adduced which was admissible against them. There was, therefore, no evidence before the judge on which he could have made an order against them, if he had been minded to do so. It may be that it would be open to this court to grant a declaration against the Hunts, but I agree that, in the exercise of our discretion, we ought not to do so. The other interesting questions which were debated at the bar have been fully discussed in the judgments of my brethren, and it is unnecessary that I should express any opinions of my own about them.

Appeal dismissed with costs.

Solicitors: *Hewitt, Woollacott & Chown* (for the appellants); *R. I. Lewis & Co.* (for the first and second respondents); *Silverman & Livermore* (for the third and fourth respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

FISHMONGERS' COMPANY, *v.* DONINGTON FINANCE CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **December 17, 18, 1940.]**

Emergency Legislation—Leave to enforce judgment or order—Counter-notice—Time for—Courts (Emergency Powers) (Consolidation) Rules, 1940 (*S.R. & O.*, 1940, *No.* 408), *r.* 8.

Practice—Appeal—Ex parte order—Order made on insufficient disclosure of facts—Right to have order set aside irrespective of merits of case.

On Sept. 3, 1940, the respondents issued a writ against the appellants claiming possession of certain leasehold property on the ground of non-payment of rent. They served with the writ a notice and form of counter-notice under the Courts (Emergency Powers) (Consolidation)

Rules, 1940, r. 8. On Oct. 2, 1940, the appellants having neither entered an appearance nor filed a counter-notice, the respondents obtained judgment on an *ex parte* application. On Oct. 4, 1940, the respondents' solicitor informed the appellants that he had signed judgment against them and called upon them to vacate the premises by Oct. 8. On Oct. 8 the appellants' solicitor filed a counter-notice and posted a letter informing the respondents' solicitor of that fact. On Oct. 9, the respondents' solicitor, before he received that letter, made an *ex parte* application for leave to proceed under the judgment, supported by an affidavit that no counter-notice had been filed or received in pursuance of the Courts (Emergency Powers) (Consolidation) Rules, 1940, r. 8 (2). The order was made and was completed on Oct. 14. The appellants thereupon appealed to the judge in chambers, who did not deal with the technical objections to the order but considered the merits of the appellants' case and dismissed the appeal on the ground that the appellants had no ground for relief:—

HELD: (i) the reference to 8 days in the form of counter-notice is not a peremptory direction, and a counter-notice is effective if filed at any time before the order giving leave to proceed is made.

(ii) the judge should have allowed the appeal, since an order made in ignorance of an essential fact is one which cannot possibly stand.

[EDITORIAL NOTE. The judgments herein clear up a point under the rules of 1940. It may be that the construction here unsuccessfully contended for is one which would not be very widely entertained, but the views of the Court of Appeal on such a matter are of importance. The court goes on to hold that, despite the fact that the appellants' case had no merits, the judge in chambers ought to have allowed the appeal. Generally speaking, the courts are disinclined to regard purely technical objections, especially where it appears that the party insisting upon them has a case of no merit. Where, however, an *ex parte* order has been made which would not have been made had the court been fully informed of the facts, and the applicant has an opportunity of ascertaining those facts and presenting them to the court, it appears that the party aggrieved can insist upon the order being set aside, although it is shown that he will have no case for relief when the merits of the case are considered.

AS TO LEAVE TO ISSUE EXECUTION, see HALSBURY, Hailsham Edn., Vol. 14, pp. 8-10, para. 13; and FOR CASES, see DIGEST, Vol. 21, pp. 428, 429, Nos. 92-103].

APPEAL by the defendants from an order of WROTTESLEY, J., dated Nov. 5, 1940. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

Constantine Gallop for the appellants.

B. B. Stenham (for *Gerald A. Gardiner*) for the respondents.

SIR WILFRID GREENE, M.R.: On Sept. 3, 1940, the respondents issued a writ against the appellants claiming possession of certain leasehold premises of which the appellants were lessees under the respondents. The ground for that claim was that the appellants were in default in payment of rent. As the judgment for possession could not be enforced without complying with the provisions of the Courts (Emergency Powers) Act, 1939, the respondents served with the writ the notice and form of counter-notice which are prescribed by the Courts (Emergency Powers) (Consolidation) Rules, 1940, for such a case. The relevant rule is r. 8, which provides in subrule (1) that in such an action the plaintiff may serve on the defendant with the writ of summons a notice to the effect of Form No. 1, with a form of counter-notice attached thereto to the effect of Form No. 2. The forms are set out in the appendix. Form No. 1 gives the defendant notice of the effect of the Courts (Emergency Powers) Act, 1939, and his rights under it, and states as follows :

> If you decide to defend the action you should enter an appearance in the action as directed by the writ of summons. But if, while not desiring to defend the action, you wish to avail yourself of the protection afforded by the said Act, you should, instead of entering an appearance, fill up, sign and detach the subjoined form of counter-notice stating your desire to avail yourself of the said protection and giving a postal address at which notices may be sent to you, and you should either file such counter-notice at the Writ Department, Central Office, or send it by post to the Senior Clerk, Writ Department, Central Office, Royal Courts of Justice, London, W.C.2 . . . so that in either case it may be received within eight days after the service of this notice on you inclusive of the day of service, or such other time as may be fixed for appearance. . . .

Then the subrule states that, if that is done, notice of any application will be served on the defendant, and it continues as follows :

> If you do not either enter an appearance in the action or file or send a counter-notice in accordance with these instructions, it will be assumed that you have no ground under the said Act for opposing the enforcement of any judgment given in the action, and the court may give leave to enforce the judgment on an *ex parte* application without any further notice.

I need not read the form of counter-notice but it is a notice of intention to take advantage of the Act, and it has attached to it a note as follows :

> This notice is to be filed at the Central Office or sent by post to the Senior Clerk . . . within 8 days after the service of this notice on you inclusive of the day of service, or such other time as may be fixed for appearance in the action.

The period of eight days mentioned in those documents expired on Sept. 11, 1940. On Oct. 2, 1940, the defendants having neither entered an appearance nor filed a counter-notice, judgment was obtained. Some correspondence ensued, and on Oct. 4 the solicitor to the plaintiffs informed the defendants that he had signed judgment for possession and called upon them to vacate the premises and added :

> . . . and in default of your failing to vacate the same by Tuesday next, the 8th instant, or of any application by you to the court for relief or otherwise my clients will proceed to recover possession upon the said judgment without further notice.

On Oct. 8, 1940, the defendants' solicitors filed a counter-notice under the Act, and they wrote a letter to the plaintiffs' solicitor on that date informing him of the fact and saying that they would be filing evidence. That letter was actually received by the plaintiffs' solicitor at 3 p.m. on Oct. 9. Some question arose as to the meaning of the phrase in the letter of Oct. 4 which refers to "application by you to the court for relief or otherwise." In my opinion, the fair meaning of that letter is that it is informing the defendants that they have got until Oct. 8 to make any relevant application to the court, and, on its true construction, it covers the making of an application to the court by means of a counter-notice, notwithstanding the fact that the 8 days have expired. We are informed that that was not the meaning which the writer intended to have put upon it. On the morning of Oct. 9, an *ex parte* application was made for leave to proceed under the judgment of Oct. 2. That application was made by lodging an affidavit with the master, and the order made upon it as ultimately drawn up was as follows :

> . . . that the plaintiff be at liberty under the Courts (Emergency Powers) Act, 1939, s. 1, to issue execution on and issue a writ for recovery of possession pursuant to R.S.C., Ord. 47, r. 1, or otherwise proceed to the enforcement of the judgment herein dated Oct. 2, 1940, against the above-named defendants.

That order was made in accordance with the normal practice. The master, having perused the affidavit, indorsed upon it a note of the order which he was making. Somewhere between 1 p.m. and 2 p.m., we were told—at any rate, before the receipt by the plaintiffs' solicitor of the defendants' letter of Oct. 8—a clerk to the plaintiffs' solicitor took up the affidavit indorsed by the master and took it back to his principal's office. That affidavit contained in para. 3 a statement to the following effect :

> No counter-notice has been filed or received in pursuance to the Courts (Emergency Powers) (Consolidation) Rules, 1940, r. 8 (2), by the defendants.

That was sworn by the solicitor to the plaintiffs on Oct. 9, and it was sworn, of course, before he received the letter of Oct. 8. We are told that a search of the file was made before that affidavit was sworn—as long before as Oct. 2, that being the day upon which judgment was signed. We are also told that the deponent construed the rules as meaning that a counter-notice must be filed during the course of the 8 days, and that no counter-notice filed after that date could have any effect. I am not quite certain whether that was the interpretation which he put upon it, or whether the interpretation was that no counter-notice could be effective unless filed before judgment was entered. I believe that it was the latter. At any rate, judgment having been entered on Oct. 2, he swore that affidavit under the impression that any counter-notice filed after Oct. 2 would be completely abortive, and in that belief he found it possible to swear that paragraph. If that was his view of the true construction of the rules, as he had no knowledge that a counter-notice had been filed, that paragraph is one to which no exception can be taken on the ground of candour, although he ought to have mentioned the date of his search. However, as will be seen, the matter does not end there. Before I proceed with the history of the case, I may say at once that, in my opinion, both the possible constructions of the rules to which I have referred are wrong. In my opinion, the reference to 8 days in the forms appended to the rules is not a peremptory drection to the effect that, unless the counter-notice is filed within the 8 days, it is useless. So to construe the rule appears to me to be construing it with a rigour and strictness most unsuitable for a rule and a set of forms to be read by, among other people, uneducated people who may find themselves being evicted. However, there is more in it than that, because, in the first place, the actual language used is not to the effect that a notice filed after the expiration of the 8 days is useless. It simply says that one should file it so that in either case it may be received within 8 days. Then the counter-notice is as follows:

> This notice is to be filed . . . within 8 days after the service of this notice on you.

It is to be noticed that there is no reference to the 8 days at all in the rule itself. It appears only in the forms. There is no rule similar to R.S.C., Ord. 12, r. 22, which deals with the case of appearance. That rule provides that a defendant may appear at any time before judgment, and, if these rules were construed as meaning that a counter-notice served after the 8 days is inoperative, it would mean that the person to whom the protection of the Act is given would be in a very much worse position than an ordinary defendant in the matter of time for appearance. In the case of a writ, appearance must be entered within 8 days, but there is an express provision that the defendant may appear at any time before judgment, and the absence of any such provision in connection with this procedure appears to me to be a very strong reason for saying that the reference to 8 days is not to be construed as peremptory. Further, it is perhaps not without importance to notice that the practice is, and apparently always has been, to accept for filing counter-notices which are sent in after the expiration of the eight days. If that practice be wrong, it means that the unfortunate person who serves the counter-notice, is being grossly misled, because, having sent in his counter-notice, and having had it received, he naturally assumes that everything is in order and that he will receive notice of any application. However, according to the construction which we are asked to place upon these rules, in such a case he would be entitled to no notice. The plaintiff could proceed *ex parte* and the defendant would find that the order had gone without his having had an opportunity of being heard. Of course, a practice of that kind does not conclude the matter at all, but it is noticeable that that at any rate appears to have been the construction placed upon these rules by those who are concerned to administer them. In my opinion, it is the right construction. The alternative would be to leave a person out of time in putting in his counter-notice to make an application to the court to have his time extended. That appears to me to be unnecessary, because, as I construe these rules, a counter-notice which is filed at any time before the *ex parte* application is made is an effective notice, and one to which attention must be paid, and, if, before the master makes an *ex parte* order, it comes to his notice that a counter-notice has been filed, even after the 8 days, his duty is to refuse to make the *ex parte* order and to require the applicant to serve a summons in the usual way. That being, in my opinion, the true construction of the rules, it is obvious that the filing of this notice on Oct. 8 was a matter which ought by some means or other to have come to the knowledge of the master before he made the *ex parte* order. The view which was taken by the solicitor as to the meaning of the rules prevented that matter from coming to the notice of the master in the first instance, but it is obvious that the practice should be so arranged that the existence in the file of a counter-notice at any time should be brought to the notice of the master before whom the *ex parte* application comes. I do not pause to suggest what the machinery should be, but there can be no possible difficulty about it. Nevertheless, I am prepared in the present case to assume, in favour of the plaintiffs' solicitor, that, when he swore that affidavit in his then state of knowledge, he conceived himself to be doing what the rules required him to do, and that he was not under any obligation to make a further search bringing it down to date on Oct. 9.

The subsequent history was that the clerk to the plaintiffs' solicitor, having taken up the affidavit with the master's indorsement, took it back to the office. Thereupon the form of order was drafted in the office, and on Oct. 14 it was brought, with the affidavit, to the appropriate officer in order that the order might be completed and sealed. At that date, the plaintiffs' solicitor knew of a fact which, even upon his own interpretation of the rules, he ought to have known it was his duty to bring before the court—namely, the fact that a counter-notice had actually been filed on Oct. 8, the day before the master made the *ex parte* order. If the solicitor had known that at the time when the application for an *ex parte* order was made, it would unquestionably have been his duty to bring the matter to the notice of the master. Having ascertained that fact after the master had put his indorsement on the affidavit, it was his clear duty not to proceed with the completion of the order without going back to the master and informing him that his order of Oct. 9 had been made in ignorance of a fact which it was essential that he should have known. If that had been done, there can be no question in my mind that the master both could and would have directed the drawing up and completion of his order to be stayed, and would have directed the plaintiff to issue a summons in the proper way so that the matter could come before him with the defendant represented. That he had jurisdiction to stay the completion of an order made in ignorance of an essential fact is, in my opinion, unquestionable, and that is what he would have done, in the circumstances, had he known them. Nevertheless, the fact was not brought to his notice. It was not brought to the notice of the court's officer who actually passed the order and sealed it, and on Oct. 14, the order was completed. The defendants, having ascertained this, then applied to the master by summons to set aside his order. The master took the view that he had no jurisdiction to do that, and accordingly an appeal was made to WROTTESLEY, J., sitting in chambers, both from that refusal and from the original order of Oct. 9. We are told that in the notice of appeal any necessary extension of time to enable the appeal from the order of Oct. 9 to be entertained was asked for. WROTTESLEY, J., did not deal with what I may call the technical point in the case, but looked at an affidavit on the merits, and decided that, on the merits, the defendants had no case for relief under the Act, and, accordingly, dismissed the appeals.

In my opinion, the question which the judge should have decided was not one which was concerned with the merits at all. It was a question whether the order of Oct. 9 could possibly stand in view of the fact that it had been made in ignorance of an essential fact, and ought not to have been, and never would have been, made if that circumstance had been brought to the notice of the master. I have no hesitation in saying that that order cannot possibly stand, and that the appeal from that order must be allowed.

With regard to the appeal, so far as it relates to the refusal of the master to set aside the order, the question whether or not he had jurisdiction to set it aside once it had been completed has not been fully argued before us, and, therefore, I do not propose to express any opinion upon that matter.

Clauson and Goddard, L.JJ., agreed.

Appeal allowed.

Solicitors: *Forsyte, Kerman & Phillips* (for the appellants); *Wilkinson, Bowen, Haslip & Jackson* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re LINDSAY'S SETTLEMENT (No. 2).

[Chancery Division (Farwell, J.), **December 18, 1940.**]

Land Improvement—Expenditure payable out of capital—Alterations and improvements to enable buildings to be let—Alterations and improvements not necessarily structural—Settled Land Act, 1925 (*c.* 18), *Sched. III, Part I, para.* (*xxiii*).

Land Improvement—Expenditure payable out of capital—Improvements—Compliance with order under Housing Act—New drainage—Inclusion of subsidiary repairs in sum payable out of capital—Settled Land Act, 1925 (*c.* 18), *s.* 83, *Sched. III, Part I, para.* (*xxi*).

(i) In 1936, the local authority required certain cottages, being property subject to a settlement, to be connected with the main sewer. In 1937, in exercise of their powers under the Housing Act, 1936, they required certain further works to be executed. If these works had not been carried out, the cottages would have been condemned. In the course of carrying out these works, additional items of repair became necessary on account of the age of the cottages. A summons was taken out to determine how far the cost of these works was to be borne by capital and how far it was to be borne by income :—

HELD : although certain items of these works viewed separately were clearly repairs the cost of which would generally be borne by income, a case of this kind must be viewed as a whole, and the whole cost, including the cost of repairs necessary to carry out the improvement, should be borne by capital.

(ii) Certain additions and alterations, not being structural additions and alterations, were made to a dwelling-house (which was settled land) to enable the same to be let :—

HELD : the words "additions and alterations" in the Settled Land Act, 1925, Sched. III, Part I, para. (xxiii) are not confined to structural additions and alterations, but may include other additions and alterations as well.

[**EDITORIAL NOTE.** The general position that expenses incurred in complying with demolition and clearance orders are properly chargeable to capital was settled some time ago. The present decision carries this matter a step further. In dealing with old property, an improvement often entails doing a number of subsidiary matters, such as plastering, papering or painting, which can quite legitimately be called repairs, and would, if done by themselves, be chargeable against income. When, however, such matters are necessitated by reason of the carrying out of an improvement in compliance with modern legislation and regulations, the cost of such subsidiary matters may be treated as part of the cost of the improvement and charged to capital. There is a second, and quite separate, point. Under the law as it stood before 1926, alterations and additions made for the purpose of enabling the property to be let could be charged to capital only if they were structural alterations and additions. The wording of the statutory provisions was altered in 1925, and it is here held that that alteration in the wording of the statute has altered the law and that, where the alterations and additions are made for the purpose of letting the property, they need not be structural.

AS TO IMPROVEMENTS TO SETTLED LAND, see HALSBURY, Hailsham Edn., Vol. 19, pp. 384, 385, para. 790 ; and FOR CASES, see DIGEST, Vol. 30, pp. 286-288, Nos. 128-143.]

Case referred to :

(1) *Re Clarke's Settlement*, [1902] 2 Ch. 327 ; 30 Digest 286, *128* ; 71 L. J. Ch. 593 ; 86 L.T. 653.

ADJOURNED SUMMONS to determine (i) whether expenses incurred for repairs in respect of settled property were payable out of capital or income, or out of capital in the first place and repayable out of income, and (ii) whether the Settled Land Act, 1925, Sched. III, Part I, para. (xxiii), was confined to additions and alterations which were structural. The facts are fully set out in the judgment.

A. H. Droop for the trustees.

C. R. R. Romer, K.C., and *V. P. M. J. O. Stranders* for the tenant for life.

FARWELL, J. : This summons raises a question as to whether certain expenditure upon several settled properties at Shepperton is expenditure which can properly be paid wholly out of capital moneys, or whether the whole or any part of that expenditure ought to be borne by income, or whether it ought to be paid in the first place out of capital and repaid by instalments out of income. The facts are these. Under a settlement of Oct. 26, 1923, Captain William Herbert

Lindsay is tenant for life without impeachment for waste, and his wife, who is alive, has a jointure, but, in the event of her surviving her husband, she then has a life interest in the settled property. Subject to that, the property is to go to the children or issue of the marriage of Captain Lindsay and his present wife. If there is no issue, as there probably will not be, subject to the life interest of the widow, if she survives, the property will go back to Captain Lindsay. The position is that both Captain Lindsay and his wife are still alive, and there is, of course, a possibility of children of that marriage, though the probabilities are that there will not be children in fact, because there has so far been no issue at all. However, one cannot, of course, deal with this matter upon the footing that Captain Lindsay will succeed to the estate, and, quite rightly, the trustees of the settlement have to do all they can to protect the inheritance in the event of there being issue who may become entitled to the property. There is no one else to represent the unborn issue, so it is therefore incumbent on the trustees, not only to argue their case in this court, but also to do what they have done in the past—namely, to see that, in all the dealings with this estate in general, proper regard is paid to the interests of unborn persons.

This particular portion of the estate is at Shepperton, and I think that Captain Lindsay came into possession of the estate in 1926. After that date, a main drainage scheme for Shepperton was carried out by the local authority, and in 1936 the local authority served notices requiring certain old cottages on the property to be connected with the main drain in lieu of the system of cesspools which then existed. The cottages in question were about 100 years old, and they had been built for, and were occupied by, either watermen or labourers, some of whom were employed on the estate. In 1937, as a result of the passing of the Housing Acts, 1935 and 1936, the local authority served on Captain Lindsay's agents several notices requiring works to be carried out to all the above-mentioned cottages. It is clear from the evidence that, if the work required to be done by the notices had not been carried out, the cottages would have been condemned. Therefore, the possibility of pulling down those existing cottages and erecting new cottages for the tenants was considered by the tenant for life and his agents with the trustees of the settlement. That would have been a costly matter, and accordingly it was decided by the tenant for life, with the concurrence of the trustees, that the work required to connect the cottages to the main sewer and to comply with the notices under the Housing Act should be done. In the course of carrying out that work, numerous defects were brought to light and had to be remedied, and, in consequence, each cottage was substantially improved. The amount which was ultimately spent on the cottages came to something like £5,000, and the question is whether that expenditure upon those cottages is an expenditure which can properly be charged against capital. The relevant statutory provisions are the Settled Land Act, 1925, s. 83, and Sched. III.

It is desirable in the first place to look at sect. 83, which provides as follows :

> Improvements authorised by this Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the works mentioned in the third schedule to this Act, or of any works for any of the purposes mentioned in that schedule, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes.

The work which has been done has been very considerable indeed. In order to connect the cottages with the main sewer, it became necessary to do considerable drainage work in connection with the property. Up to that time, they had had no drainage system other than by means of cesspools, and that could not remain, because the district council were no longer prepared to deal with cesspools. It was, therefore, necessary for a new drainage system to be provided for these cottages. Further, the cottages, as I say, were built some 100 years ago, at a time when not so much consideration was paid to the housing of the poorer classes as it is to-day, and also at a time when the requirements of the persons who were going to occupy the cottages in the first instance were not so great as they are at the present time. However that may be, it became necessary, in the course of doing the works necessary to comply with the notices of the district council, among other things to put in a damp course. The effect of doing that was in many cases seriously to affect the plaster of these old cottages. In some cases, the ceilings were injured as a result of carrying out these various works, and, in the end, the result was that many improvements became necessary, and was, in fact, effected. This resulted in a great improvement of the cottages, but involved expenditure which, if taken by itself, and if carefully analysed and split up, would not be strictly included in the sort of expenditure which ought to be thrown on capital, but would be the sort of expenditure which would properly be borne by the tenant for life.

The word " improvement " in Sched. III, Part I, para. (xxi), does not, in my judgment, mean simply repairs. I am not going to attempt to define the words " reconstruction, enlargement or improvement of any of those works." It seems to me that it would be not only very difficult, but also most unwise, for me to attempt to frame a general formula to be applied to various cases as and when they arise. Each case must be dealt with on its own facts, and it seems to me impossible to do more than to pay regard to the word " improvements " as meaning, taken by itself, something which is more than an ordinary repair which a tenant for life or an occupier of a dwelling-house or property habitually does from time to time in order to keep the place in a proper state of repair. I think that, generally speaking, the word " improvements," as used in this paragraph, does necessarily involve, when taken by itself, something which is not repair within the ordinary meaning of that word, but it seems to me that, in a case of this sort, where there has been an improvement of the cottages to a large extent by making considerable alterations in the drainage works and in the actual structure itself, it is impossible to split up the total expenditure and say: "This particular item for papering the walls of this room cannot be an improvement within the Act. Therefore, it must be borne by the tenant for life." That, no doubt, is perfectly true taken by itself, but, in my judgment, in a case of this sort, one must consider the whole matter as one. This is a case where it became necessary to improve property for this particular class of persons, and, in order to carry out that improvement, it became necessary to do, not only certain things which one could not call repairs at all, but also certain other things which might well be taken as repairs if dealt with individually, but which, as a whole, were all part of the work which was necessary in order to carry out the improvement. These trustees, I think with the best intention, have taken the trouble through their advisers to dissect to some extent the expenditure in this case. They put in one schedule a list of the expenditures which they thought could properly be paid out of capital, and in a second schedule they put various things which they considered doubtful, while in a third schedule they put particular things which they considered clearly ought to be paid out of income. If one had to deal with this matter piecemeal, and had to consider the expenditure on things in the first schedule by itself without reference to anything else, then to a great extent I have little doubt that the trustees were quite right in saying that those particular expenditures would have been borne by income. In my judgment, however, that is not a reasonable and proper way of dealing with this case, especially having regard to the actual language of sect. 83. In this case, the work which has been done has resulted in there being on this estate cottages for the labourers, who are servants and artisans, whether on the settled estate or not, which are reasonably decent dwelling-houses for those particular persons. In the result, the improvements to the existing buildings have brought that about, and, in order to bring about the improvement which has resulted, it was necessary to do all the works which have in fact been done. Therefore, not treating the matter piecemeal and considering each item separately, but looking at the whole matter and taking a broad view, I think that the whole of the work which in fact has been done (and which has been done under proper advice and supervision) can properly be said to be an improvement of the cottages for servants, labourers and artisans, whether employed on the settled estate or not, and, consequently, the whole of this expenditure can properly be defrayed out of capital.

I now come to the second question which is whether the words in the Settled Land Act, 1925, Sched. III, Part I, para. (xxiii), "additions to or alterations in buildings reasonably necessary or proper to enable the same to be let," are confined to structural additions or alterations, or whether they may be given a wider meaning. In connection with that, it is to be noticed that in Part II, para. (v), which follows almost immediately after that paragraph, improvements, the costs of which the trustees of the settlement or the court may require to be replaced by instalments, are to include:

> . . . structural additions to or alterations in buildings reasonably required, whether the buildings are intended to be let or not, or are already let.

I think that, having regard to that second provision, I should have very little doubt that the word " structural " was not intended to be read into para. (xxiii), and I should have little doubt that, when " additions to and alterations in buildings " were being referred to there, they were not confined to structural additions or alterations, but would include any reasonable and proper alterations and additions which were necessary to enable the property to be let.

However, there are authorities under the earlier Settled Land Act which are undoubtedly binding on me, and which decide that " additions to or alterations in buildings reasonably necessary or proper to enable the same to be let " must be read as confined to structural alterations. That appears from *Re Clarke's Settlement* (1), a decision of BUCKLEY, J., which was upheld by the Court of Appeal. Therefore, if this Act were in this connection the same as the earlier Act, I should feel myself bound, whatever my own view might be, to give effect to that decision, but in this Act para. (v), " structural additions to or alterations in buildings reasonably required," is new, and in this Act one gets for the first time the use of the word " structural " with reference to additions to or alterations in buildings, and I think that it is extremely significant that immediately preceding that part of the Act, where the schedule deals with alterations to or additions in buildings reasonably necessary or proper, the word " structural " is not inserted. It may well be that, when a tenant for life is desirous of making alterations in a building reasonably required, although he is not proposing to do it for the purpose of enabling the building to be let, those alterations or additions should be confined to that which is strictly structural, whereas, where the tenant for life is desirous of making alterations or additions to enable a building to be let, there would seem to be much less reason for limiting the extent of his powers. In the first case, the alterations or additions to be made in the buildings do not merely innure for his own benefit, but may extend beyond his own enjoyment of the property, and be beneficial to the remaindermen. A structural alteration or addition to buildings which are not let will not necessarily benefit those taking in remainder.

In the circumstances, I have to construe, not the Settled Land Act, 1890, but the Settled Land Act, 1925, and, although, in construing it, I must have regard to the way in which the court treated the words " additions to or alterations in buildings " in the earlier Act, those are not the decisions which bind me when I am dealing with another Act which contains different provisions. Whatever the view may have been as to the earlier Act, having regard to the fact that in this Act the word " structural " is inserted in this particular paragraph of Part II and that no such word is to be found in the earlier paragraph, the conclusion to which I feel bound to come—and I think that it is a proper conclusion—is that the word "structural" was omitted purposely when this Act was drawn, and that there is no justification for reading into this clause the word "structural," and that, therefore, "additions to or alterations in buildings reasonably necessary or proper A to enable the same to be let" are not necessarily alterations and additions which are purely structural, but may include other additions and alterations as well.

Declarations accordingly.

Solicitors: *Cohen & Cohen* (for the trustees and for the tenant for life).

B

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

C

G. H. RENTON & CO., LTD. *v.* BLACK SEA AND BALTIC GENERAL INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J.), **November 20, 1940.**]

D *Insurance—Marine insurance—Insurance of cargo—Termination of risk—Custom of port—Cargo sorted by port authority after discharge from ship.*

A policy of marine insurance provided that the insurance included risks of non-delivery until discharge at port of destination and whilst in transit by land or water to final destination there or in the interior. E The insured goods were certain timber which was unloaded at a London dock. The custom of the port was proved to be to stack the timber on the quay alongside the ship from which it was discharged. It was subsequently sorted by the Port of London Authority, and it was then piled according to the sizes and marks in a shed. Until it was so piled in the shed, the consignee was not allowed to touch it. It was contended that the transit of the timber was not completed until the timber was F sorted and piled, and that, therefore, a claim for a number of standards found to be missing after the timber had been piled was good:—

HELD: the transit ended when the timber was unloaded on the quayside, and the cargo-owners were accordingly not entitled to recover under the policy.

G [**EDITORIAL NOTE.** The contention in this case is based upon the custom of the port which prevents the consignee from examining the goods as to either quantity or quality until they have been sorted and piled by the port authority. For this purpose, the goods seem to have been moved some distance in the dock, and it was therefore contended that the transit of the goods was not completed until they were made available to the consignee. This view, however, is rejected.

H AS TO DISCHARGE OF GOODS AND TERMINATION OF RISK, see HALSBURY, Hailsham Edn., Vol. 18, pp. 241-243, paras. 330-335; and FOR CASES, see DIGEST, Vol. 29, pp. 131-134, Nos. 826-868.]

Cases referred to:

(1) *Brown* v. *Carstairs* (1811), 3 Camp. 161: 29 Digest 132, *849*.

(2) *Westminster Fire Office* v. *Reliance Marine Insurance Co.* (1903), 19 T.L.R. 668; 29 Digest 133, *853*.

Action under an insurance policy claiming the value of a parcel of standards stolen from cargo discharged and stacked, but not piled. The facts are fully set out in the judgment.

Sir Robert Aske, K.C., and *Cyril T. Miller* for the plaintiffs.

A. T. Miller, K.C., and *Hon. H. L. Parker* for the defendants.

Viscount Caldecote, L.C.J. : This is a claim by the plaintiffs, who are timber importers, against the underwriters of a part cargo of sawn goods which were loaded on the steamship Dayrose for carriage from Igarka to London. A short question on the construction of a policy of marine insurance is involved. The claim concerns a parcel of 12 standards, of which the value is £200 odd. The bill of lading for this parcel was for carriage to London, Surrey Commercial Docks. The steamer had sailed on the date of the policy. She berthed on Sept. 23, when the discharge took place in accordance with the Port of London usage.

The facts, so far as they are known, are not in dispute. A witness has been called on each side to prove the facts, but there is no difference between the evidence given by Waterhouse, a dock inspector in the plaintiffs' employ, and Dempsey, a wood inspector with the Port of London Authority. The practice of the Port of London is well-known. In accordance with it, on this occasion private stevedores were engaged and paid by the ship to discharge the cargo. The timber was put out on to the quay alongside, close up to the ship. It was tallied by the ship and the cargo superintendent out of the ship. It is put into what is called a stack or bulk when it is discharged from the ship, and is subsequently sorted by the Port of London Authority. The sorting took place in connection with the cargo from the ship according to the sizes and marks of the timber. The Port of London Authority employed deal porters to take the timber away and put it in the shed in another place, sorted as I have described. The discharge was finished on Oct. 12, but meanwhile the piling had begun. It began on Sept. 26 and finished on Nov. 7. I was informed that the Port of London Authority frequently begin piling while the cargo is coming over the side of the ship, and that is what happened in this case. The counting of the timber in the pile or piles began on Nov. 7—namely, on the same day as that on which the piling was finished—and the counting took some days to complete and was completed only a day or two before Nov. 30, which was the date of the landing returns. The consignees, according to the usage of the Port of London, are not allowed to put their hands on the timber until it has been piled—that is to say, sorted—and the landing returns have been sent out save in very exceptional cases.

The material terms are contained in the body of the policy and in a slip attached to it called the Timber Trade Federation Insurance Clauses. The body of the policy is in the well-known form. The insurance is to be upon the goods and merchandise from the loading thereof aboard the ship, as above, and shall so continue and endure, and so on, until the ship shall be arrived at London, and the goods and merchandise be there discharged and safely landed. Up to this point, it is an insurance against perils of the sea. By the slip attached to the policy, however, it becomes for all practical purposes in this case an all-risks policy, and the cover given by the policy extends beyond that which is given by the body of the policy.

The question which arises in this case concerns cl. 2 of the Timber Trade Federation Insurance Clauses, which provides as follows :

> Including risks of theft, pilferage and non-delivery, irrespective of percentage . . . whilst on board the ocean-going vessel until discharged at port of destination and whilst in transit by land and/or water to final destination there or in the interior.

The question is when the risk ended, and, in order that that question may be decided, I am asked by the plaintiffs to say that the risk continued to apply to these goods until they had reached the piles, or until the piles had been completed, or, alternatively, until the consignees were allowed to put their hands upon the cargo and remove it.

The question of construction, as applied to the facts in this case, which has to be decided is whether the goods were in transit by land and/or water to final destination there or in the interior. Counsel for the plaintiffs says that the stack—or what Dempsey said is generally called the bulk—is not the final destination, because the goods had to be sorted and piled, and because the receivers did not handle the goods until this was done. After listening to the full and helpful arguments which have been addressed to me, I find it impossible to think that the final destination can be determined by reference to the permission or the right which the receivers obtained from the Port of London in due course to handle and remove the cargo. The final destination is a question of fact. This clause is a clause of the Timber Trade Federation, and is intended to apply, no doubt, to cargoes and ships other than those which are loaded or discharged in the Port of London, and, as I suggested in argument, it is not difficult to imagine cases to which the words of the clause to which I have referred apply easily, without raising any question of interpretation. The goods are insured whilst in transit by land or water to final destination there or in the interior, and, when the ship, completing her obligation, puts the goods over the side of the ship on to the quay, and the goods have then to go to another part of the dock or port, either by land or by water, there is not much difficulty in seeing that the risk continues while they are in transit to the place to which they have to go. The consignees may themselves have a place of business, or a shed, in the dock or at the dockside, or, as the clause says, in the interior, and, in such a case, there would not be much difficulty in arriving at the conclusion that the goods were covered while they were going, or, in other words, while they were in transit to the place where the consignees carried on their business, and where they required the goods to be sent.

The question which arises in this case, on the facts of the case, is whether the final destination was the place at which the goods arrived when they

were bulked or stacked, or whether the final destination had not then been reached. In the view which I have formed, the facts do not justify a conclusion that the goods were still in transit for the purposes of this clause after they had reached the quayside or the shed in which they were placed in bulk. If the plaintiffs' contention is right, the final destination of the cargo, which might be taken in exceptional circumstances from the A
pile, but before the piling is completed and before the counting is completed, would be different from the final destination in the case of goods which had to wait until the final piling and counting had been finished.

Certain authorities have been cited to me. I cannot say that I find very much guidance in the interpretation and application of this clause B
from *Brown* v. *Carstairs* (1), to which counsel for the defendants referred me. The words of this clause are quite different from those in that case. Nor do I find much assistance from *Westminster Fire Office* v. *Reliance Marine Insurance Co.* (2), in which the Court of Appeal were dealing with a very different clause, which was as follows : C

> Including all risk of craft to wharf or export vessel at port of discharge, and, in the event of the goods being temporarily placed upon the quay, it is agreed to hold the same covered while there until delivered to the export vessel or at any wharf or warehouse within the limits of the port.

The point taken there was that, as the consignee had not made up his mind to put the goods into an export vessel or into a wharf or warehouse D
within the limits of the port, the transit of the goods was at an end, but the Court of Appeal rejected that argument. However, that is a very different case from the present, where a particular terminus *ad quem* is not mentioned, as it was in that case—namely, an export vessel or a warehouse within the port—and where the simple words are "final E
destination," thus leaving it to be decided in each case where the final destination is.

I think that the final destination for the purposes of this case and this particular parcel of goods was the shed or the space to which the goods were delivered, and the mere fact that they had been moved to another F
part of that shed and piled according to their marks seems to me to make no difference at all. It is quite conceivable that the goods might have been put under their marks and sizes as they were delivered from the ship, but, according to the usage of the port, the goods are bulked without regard to their marks and sizes, and the fact that they were moved to G
another part of the shed does not, in my view, prevent the shed from being their final destination.

Having come to that conclusion, I find it unnecessary to say anything about the further point taken by counsel for the defendants upon the policy—namely, that the final destination was the pile. It was said that H
the plaintiffs had not given any proof of non-delivery to the pile, so as to bring themselves within the policy, because the missing goods might have reached the pile, in which case the risk would have terminated, because they had reached their final destination. I think that, on those facts, and in the absence of any evidence that any destination other

than this place at the quayside was intended for these goods, they had reached their final destination when they were taken from the ship by the Port of London Authority, even although the task of sorting and piling the goods had still to be completed before the consignees took the goods away. I therefore find that the plaintiffs have failed to bring themselves within the terms of this policy, and the action must be dismissed.

Judgment for the defendants with costs.

Solicitors: *William A. Crump & Son* (for the plaintiffs); *Parker, Garrett & Co.* (for the defendants).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

SUMMERS v. SALFORD CORPORATION.

[MANCHESTER AUTUMN ASSIZES (Croom-Johnson, J.), **December 5, 1940.**]

Landlord and Tenant—Repairs—Statutory obligation—Extent of obligation—Covenant implied by course of conduct of landlord—Housing Act, 1936 *c.* 5), *s.* 2.

The plaintiff was the tenant of the defendant corporation of premises to which the Housing Act, 1936, s. 2, applied, so that the corporation impliedly undertook that during the tenancy the premises would be kept in all respcts reasonably fit for human habitation. In Feb., 1940, or Mar., 1940, the plaintiff notified the corporation that one sash-cord of one of the windows in the premises was broken. On Apr. 3, 1940, the other sash-cord broke while she was cleaning the window and she was injured. She claimed damages on the ground that the defendants had broken the covenant implied in her tenancy agreement by the Housing Act, 1936, s. 2. It was further contended that, as the corporation had previously carried out similar repairs on their housing estate, there would be an implied term in the tenancy agreement that they would repair the sash-cord :—

HELD : (i) having regard to what the corporation was doing on its housing estate generally and to the extent of the defect of which complaint was made, there was no breach by them of their statutory obligation.

(ii) in view of the statutory obligation, there could be no further implied term derived from the course of conduct of the corporation.

[**EDITORIAL NOTE.** The question here considered was the subject of certain observations of the Court of Appeal in *Morgan* v. *Liverpool Corpn.* (1). The Lords Justices who heard that case differed among themselves, and in the present case the view expressed by P. O. LAWRENCE, L.J., is preferred. It will be noticed that the extent of the statutory obligation appears to be stated to be a question of fact in every case. It is perhaps a little difficult to see how the extent of the statutory obligation can be dependent upon what the landlord is doing in general for the whole of his estate. There are obviously cases where the statutory obligation will have to be construed with reference to a single property, the landlord not being the owner of a housing estate but being the owner of a single house. At the same time, the statutory obligation is only to keep the house reasonably fit for human habitation, and it is clear that the word " reasonably " introduces, if not a pure question of fact, at any rate a mixed question of fact and law. It will be further noticed that it was argued that the requirements which make a house fit for human habitation are more stringent now than they were 13 years ago when *Morgan* v. *Liverpool Corpn.* (1) was decided. The contention seems to have been accepted and increases the difficulty of ascertaining what amount of repair fulfils the statutory obligation.

As to Implied Covenant to Repair, see HALSBURY, Hailsham Edn., Vol. 20, pp. 204-206, paras. 223, 224; and for Cases, see DIGEST, Vol. 31, p. 348, Nos. 4900-4904.] A

Case referred to:

(1) *Morgan* v. *Liverpool Corpn.*, [1927] 2 K.B. 131; Digest Supp.; 96 L.J.K.B. 234; 136 L.T. 622. B

Action for personal injuries. The plaintiff was a tenant of one of the defendant corporation's houses. In one of the rooms the window-cord of one window was broken. The plaintiff stated that she complained of this to the rent-collector, but that, before it was repaired, the other cord broke while she was cleaning the window and her hands were injured. C The house came within the Housing Act, 1936, s. 2.

N. J. Laski, K.C., and *H. N. Lever* for the plaintiff.

A. Denis Gerrard for the defendants.

Croom-Johnson, J.: The plaintiff, Mrs. Florence Summers, is 54 D years of age. For 34 years she has been the tenant of the Salford Corporation of premises known as 23 King Edward Street, at a rental which brings the house admittedly within the provisions of the Housing Act, 1936, s. 2, as being a house situate elsewhere than in London at a rent not exceeding £26 per annum. Under that section, an undertaking is E implied in any contract for letting such a house for human habitation that the house will be kept by the landlord during the tenancy in all respects reasonably fit for human habitation.

On Apr. 3, 1940, the plaintiff was cleaning the window in the front bedroom upstairs. She put her hand up and drew down the window F a matter of a few inches. She knew that the sash-cord on the one side had broken, and that that would cause the window to jam, because it would not run evenly. For the purpose of her cleaning operation, she placed her hand on the top of the sash of the lower part of the window, and she was cleaning the top part with her right hand when the remaining G cord broke and the sash fell down in its groove and jammed the plaintiffs' two hands between the two sashes. As a result, she suffered rather serious injuries to her left hand, which are the subject of an agreed medical report, showing that her left hand has been made entirely useless and that she has no grip at all with it. That condition is permanent and H stationary, and is due to local physical injuries she sustained. The right hand appears to be affected also, but that appears to be more largely due to her general health, which has apparently suffered as the result of the shock which she has sustained.

The day following the accident, she met Leach, who for the last two years had collected the rents for this estate, consisting of some 720 houses. At once, having shown her hands to Leach, she indicated to him that she had complained of the one broken sash-cord some time before.

Those are all the admitted facts in this case. I am satisfied that the plaintiff had mentioned the fact that one cord was broken some time in Feb., 1940, or Mar., 1940. I suspect that she did not call attention to it in the firm way she did in the witness-box before me. Nevertheless, I think that there was a sufficient drawing of the attention of the one authorised representative of the defendants to whom she had access, and with whom she dealt, to this want of repair. The question is whether there is anything in those circumstances which enables her to say that there has been a breach of any obligation undertaken by the defendants with regard to the subject-matter of this weekly tenancy.

The question is whether this defect in the window-cord is something which can be said, as a question of fact, to be a failure by the defendants to keep the premises in all respects reasonably fit for human habitation. It is not the same test as that of keeping the premises fit for human habitation. In so far as those words are concerned, they are used in many sections in this Act of Parliament. By sect. 188 (4) of that Act, I am driven to construe those words by having regard to a variety of matters. If that is right, I look to see to what extent, by reason of want of repair or of the sanitary defects, the house falls short of any provisions of any bye-laws, or of any enactment in local operation in the district, as to the construction and draining of new buildings, the laying out and construction of new streets, or the general standard of housing accommodation for working classes in the district. I would say with regard to the last matter that I am wholly uninformed by any evidence in this case as to what is the general standard of housing accommodation for the working classes in this district, except that apparently it is the practice of the defendants, when asked to do so, to repair window-sash cords.

Counsel for the plaintiff intimated to me the necessity for ventilation in a house, and said that one could have too much ventilation or too little. He suggested that the standards of 1927—in which year a decision to which I shall refer was given—and the standards of 1940 were so different that I could derive no benefit or assistance from what other people had thought 13 years ago. He said that, looking at this broadly, I had to consider whether it was right to say that in all respects this house was fit for human habitation. I think that the words "reasonably fit for human habitation" mean exactly what they say. That phrase presupposes that I am not to take absolute standards. There must be a certain amount of give and táke.

Had I been left to form my own opinion in the matter, I should have thought that the failure to repair a window-cord was like the failure to repair the handles of the front door or the knocker or the letter-box, or any other of those things which are convenient to have in a house, and was not a failure by the defendants to keep this house in all respects reasonably fit for human habitation. In 1926, however, this matter was litigated in the Liverpool Court of Passage in *Morgan* v. *Liverpool Corpn.* (1). The words to which I have referred were examined from the point of view of an accident of a somewhat similar nature to the one in this case relating to the breakage of a sash-cord. Those words then appeared in the Housing Act, 1935, s. 1, which is in practically the same terms as sect. 2 of the Act of 1936. The facts in that case were that there was a latent defect in a window-cord, and the decision which the court gave was that a tenant must give notice to a landlord before it can be said that the landlord is under an obligation to effect the repairs called for by the Housing Act, 1925, s. 1. I must bear in mind that the facts there were a little different, because in this case the defect was not latent but patent. It was there to be seen. The judge of the Liverpool Court of Passage came to the conclusion that the premises in question in *Morgan* v. *Liverpool Corpn.* (1) were not in all respects reasonably fit for human habitation, and he gave judgment for the plaintiff.

The Court of Appeal allowed an appeal against that decision, on the ground that notice of the defect was a necessary preliminary condition before the defendants could be made liable for any consequences of a want of repair, and, inasmuch as the plaintiff, Morgan, had not given that notice, the action necessarily failed. In the course of the judgments in the Court of Appeal, the Lords Justices considered the further question as to whether assuming that notice had been given, this latent defect made the house not reasonably fit for human habitation. The decision on the point was, I think, possibly unnecessary, because it is a question of fact, and the facts and circumstances must, in my judgment, differ in different cases. Thus the observations to which I have been most properly referred to-day are *obiter dicta*. There was a difference of opinion. Atkin, L.J., [at p. 146] took the view that the question whether the window in one of the only two bedrooms was capable of being opened with reasonable facility, and, if it were not opened, would have to remain shut, had a bearing upon the question whether a room was reasonably fit for human habitation. In my opinion, that may or may not be the case.

With great respect for the opinion of Lord Atkin, the question is not whether a particular room is reasonably fit for human habitation, but whether the house, the premises demised as a whole, can be said to be reasonably fit for human habitation. There must, I think, be some limit given to the words of the statute. Lord Hanworth, M.R., took the view expressed at p. 138, although, in order to make a house in all respects fit for habitation, it may be observed that he has not expressly referred at that point to the word "reasonably." In order to make a house in all respects fit for habitation, it is clear that it must have windows which open. It appears to me that the breaking of a window-cord is an incident in the course of the habitation of a house which must occur from time to time in all classes of houses, inhabited by all kinds and classes of persons. In itself, I cannot see that that incident afforded a proof or a test which one could apply in determining whether the house was fit or unfit for human habitation. It will be observed that in the whole of that passage LORD HANWORTH, M.R., does not find it necessary to remind himself that the test is whether or not the house is reasonably fit. P. O. LAWRENCE, L.J., takes a much stronger view. He says, at p. 152 :

> A The utmost that in my opinion could be said was that the back room was rendered less comfortable, and that in order to have complete enjoyment of it the window-cords would have to be replaced by new cords. It seems to me, with the greatest respect to those who hold a different view, that to say that, therefore, the house was in some respects unfit for human habitation, is somewhat fantastic. Such a slight want of repair as a defective window-cord or defective window-cords cannot, and does not, in my opinion, constitute a breach of the undertaking mentioned under
> B sect. 1 of the Act.

I think that, using those statements as some sort of guide to the problem I have to consider, I really have to decide as a question of fact whether this house was, on Dec. 3, not being kept by the defendants in all respects reasonably fit for human habitation. I have to look at it as a whole,
C and, it being accepted at the bar in this case on both sides that this is a question of fact for my determination, I have come to the conclusion that it is impossible, on what the defendants were doing on their housing estate and for this particular place, and on the extent of this defect, for me to hold that there was any breach by the defendants of this statutory
D obligation upon them.

That is not quite sufficient to dispose of the case. Apparently the Housing Committee of the Salford Corporation, as good landlords frequently do, were not minded to be too particular or too meticulous in the examination of their legal responsibilities when tenants on a large working-
E class housing estate made complaints and asked for repairs to be done. They apparently quite frequently, in the exercise of that proper discretion which is conferred on local authorities in this country, and especially on local authorities in managing for the ratepayers what is the ratepayers' property, executed repairs without looking to see whether or not they
F had a legal agreement with the tenants. It is now suggested that this course of conduct by them gives rise to an implication which I ought to make in this tenancy agreement—namely, that the true contract between these parties was that the tenant was entitled to have her window-cord made good by and at the expense of the corporation. In this connection,
G I was referred to No. 15 of the conditions of tenancy indorsed upon the rent card or rent-book, which contains a proviso which is usually found in most well-drawn tenancy agreements or leases of house property under which the landlord is given the right at reasonable times to enter upon the demised premises to inspect and view the state and condition of the
H same, and to execute any repairs which he wants done. That right of entry does not increase the landlord's responsibility in any way, but it is said that I must look upon the fact of repairs being done, and imply in this tenancy agreement an agreement by the corporation to do all these other repairs. I do not think that I ought to imply in this contract, or in any other contract, any term unless it is absolutely necessary to imply

it, apart from implications from law in order to give business efficacy to the transaction. I certainly do not think that I ought to imply a term dealing with repairs when there is in existence a statutory term incorporated into the contract whether the corporation like it or not, by virtue of sect. 2 of the Act of 1936. In those circumstances, I do not find myself able to imply any additional term. It follows, for the reasons I have indicated, that I think that this action fails.

Action dismissed.

Solicitors: *Leslie Lever & Co.* (for the plaintiff); *James Chapman & Co.* (for the defendants).

[*Reported by* M. D. Chorlton, *Barrister-at-Law.*]

OCEAN STEAMSHIP CO., LTD. *v.* QUEENSLAND STATE WHEAT BOARD.

[Court of Appeal (MacKinnon, Luxmoore and du Parcq, L.JJ.), **December 16, 19, 1940.**]

Practice—Service out of the jurisdiction—Contract governed by English law—Express provision and further conflicting provision—R.S.C., Ord. 11, *r.* 1 (*e*) (*iii*).

The defendants shipped a quantity of weevil-infected wheat at Brisbane in the plaintiffs' vessel. That wheat was the cause of damage to other cargo on the ship, and the plaintiffs, having paid certain sums by way of damages to the owners of that other cargo, claimed the sums so paid from the defendants. The defendants being domiciled in Australia, the plaintiffs applied for leave to serve the writ out of the jurisdiction on the ground that the contract was one governed by English law. The bill of lading contained a clause expressly stating that it was to be governed by English law, but it also contained a provision incorporating all the terms, provisions and conditions of the Australian Carriage of Goods by Sea Act, 1924, and the schedule thereto, and stating that, if anything contained in in the bill of lading was inconsistent with that Act, it should to the extent of such inconsistency be null and void. Sect. 9 of that Act provided that all parties to any bill of lading relating to the carriage of goods from any place in Australia should be deemed to have intended to contract according to the law in force at the place of shipment and that any stipulation to the contrary should be null and void and of no effect:—

Held: the contract was governed by the law at the place of shipment, namely, Brisbane, and leave for service out of the jurisdiction could not be granted under R.S.C., Ord. 11, r. 1 (*e*) (iii).

[**EDITORIAL NOTE.**—This is purely a question as to which of two quite inconsistent clauses of a contract is to prevail. The matter is one of some difficulty and considerable commercial importance, and it is understood that it is to be taken to the House of Lords.

As to Service out of the Jurisdiction, see HALSBURY, Hailsham Edn., Vol. 26, pp. 31-35, paras. 44-50; and for Cases, see DIGEST, Practice, pp. 343-351, Nos. 605-666. See YEARLY PRACTICE OF THE SUPREME COURT, 1940, p. 88.]

Cases referred to:

(1) *Dobell & Co.* v. *Rossmore S.S. Co.*, [1895] 2 Q.B. 408; 41 Digest 429, *2697*; 64 L.J.Q.B. 777; 73 L.T. 74.

(2) *Logan* v. *Bank of Scotland* (*No. 2*), [1906] 1 K.B. 141; 11 Digest 477, *1310*; 75 L.J.K.B. 218; 94 L.T. 153.

(3) *R.* v. *International Trustee for Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500; [1937] 2 All E.R. 164; Digest Supp.; 106 L.J.K.B. 236;
A 156 L.T. 352.

(4) *The Hagen*, [1908] P. 189; Digest Supp.; 77 L.J.P. 124; 98 L.T. 891.

(5) *Société Générale de Paris* v. *Dreyfus Bros.* (1885), 29 Ch.D. 239; (1887) 37 Ch.D. 215; Digest, Practice, 339, *574*; 57 L.J.Ch. 276; 58 L.T. 573.

APPEAL by the plaintiffs from a judgment of STABLE, J., dated Oct.
B 24, 1940. The facts are fully set out in the judgment of MACKINNON, L.J.

A. T. Miller, K.C., and *H. I. Nelson* for the appellants.

F. A. Sellers, K.C., and *G. G. Blackledge* for the respondents.

MACKINNON, L.J.: This is a difficult case, which raises an important
C question. The plaintiff company are owners of the S.S. Nestor. The defendant board shipped on that vessel at Brisbane parcels of wheat under various bills of lading. According to the plaintiff's case, that wheat on the voyage became infested with weevils, and the weevils so produced caused damage to bags of flour shipped by other shippers.
D The plaintiffs have had to pay damages to the owners of the flour, and have incurred expenses. They claim that the defendants are liable to indemnify them against these damages and expenses, in that the defendants committed a wrong to them in shipping wheat which had in it the seeds of this trouble.

E The defendants being domiciled in Australia, the plaintiffs applied to the District Registrar at Liverpool for leave to serve a writ out of the jurisdiction pursuant to R.S.C., Ord. 11, r. 1 (*e*) (iii). The registrar gave leave by an order dated Apr. 12, 1940. The solicitors for the defendants entered a conditional appearance

> F . . . without prejudice to an application (i) to set aside the writ and (ii) to discharge the order authorising such service.

That application was duly made to the district registrar, and on Sept. 23, 1940, he dismissed it. The defendants appealed from such dismissal to the judge in chambers. On Oct. 24, STABLE, J., allowed the appeal and
G set aside the order for service of the writ. The plaintiffs appeal to this court, and ask that the order of the registrar may be restored. R.S.C., Ord. 11, r. 1 (*e*) (iii), provides as follows:

> Service out of the jurisdiction of a writ. . . may be allowed . . . whenever (*e*) The action is one brought . . . to recover damages . . . in respect of the breach of a contract . . . (iii) by its terms . . . to be governed by English law. . . .

H The contract between the plaintiffs and the defendants is the bill of lading under which the defendants' wheat was shipped. It is an immensely long document printed in very small type. Clause 16 provides as follows:

> The contract evidenced by this bill of lading shall be governed by the law of England.

Upon that, it would appear plain that the plaintiffs have *prima facie* a right to assert that they are entitled under R.S.C., Ord. 11, to ask for, and obtain, leave to serve a writ on the defendants out of the jurisdiction. However, the defendants rely on other parts of the bill of lading, and in particular on cl. 1. The material part is the first paragraph, which provides as follows : A

> All the terms, provisions and conditions of the Australian Carriage of Good by Sea Act, 1924, and the schedule thereto are to apply to the contract contained in this bill of lading ; and the carrier is to be entitled to the benefit of all privileges, rights and immunities contained in such Act and the schedule thereto as if the same were herein specifically set out. If anything herein contained be inconsistent with the said Act and schedule it shall, to the extent of such inconsistency and no further, be null and void. B

The Australian Carriage of Goods by Sea Act, 1924, is the equivalent of the British Carriage of Goods by SeaAct, 1924. The object of both was to give statutory effect to what are known as the Hague Rules. Those rules are set out in the schedule of each Act, and the two schedules are in identical terms. C

The effect of incorporating the provisions of the Australian Act into the contract is similar to the effect of the older practice of incorporating the terms of the American Harter Act. As to that, in *Dobell & Co.* v. *Rossmore S.S. Co.* (1), LORD ESHER, M.R., said, at p. 412 : D

> . . . what we have to do is to construe the bill of lading, reading into it as if they had written into it the words of the Act of Congress.

A little further on, he said, at p. 413 :

> They then introduce into their bill of lading the words of the Harter Act, which I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading. E

In the result, in effect, the contract in this bill of lading is this : " This contract is to be governed by English law. The goods are shipped by the shippers and are to be carried by the shipowners pursuant to the 15 clauses in very small print, supplemented by the terms of the Australian Act and its schedule, which are to be read into this contract as additional stipulations in it." F

The object of this cl. 1 was obviously to make the shipment subject to the Hague Rules, set out in the schedule to the Act. That object would have been sufficiently assured if the clause had read : " All the terms, provisions and conditions of the schedule to the Australian Act of 1924 are to apply to the contract in this bill of lading, and the carrier is to be entitled to the benefit of all privileges, rights and immunities contained in such schedule as if the same were herein specifically set out." If that were the wording, there would be nothing to impair the full and effective validity of cl. 16 : G H

> The contract evidenced by this bill of lading shall be governed by the law of England.

However, the clause as printed incorporates as part of the contract not only the schedule of the Act, but also " all the terms, conditions and provisions" of the Act itself, as well as the schedule, and the second sentence is as follows:

> If anything herein contained be inconsistent with the said Act and schedule it shall, to the extent of such inconsistency, and no further, be null and void.

The defendants are anxious not to be sued in the English court. The A plaintiffs' right so to sue them can arise only if cl. 16 is valid and effective. As cl. 1 incorporates all the provisions of the Australian Act, the defendants naturally rely upon part of sect. 9 of the Act, which, so far as material, provides as follows:

> All parties to any bill of lading relating to the carriage of goods from any place in Australia shall be deemed to have intended to contract according to the laws in B force at the place of shipment, and any stipulation . . . to the contrary . . . shall be null and void and of no effect.

I am driven to the conclusion that the immensely complicated contract between the parties in effect becomes this: "1. This contract is to be governed by English law. 2. The goods are shipped and are to be C carried on the terms of the mass of small print hereon, supplemented by the terms of the Australian Act and its schedule, which are to be read into this contract as additional stipulations. 3. By reason of one of those additional stipulations, we are to be deemed to contract according to the law in force in Brisbane, and anything in our D contract to the contrary is to be null and void and of no effect." I am therefore driven to the conclusion that cl. 16, providing that the contract is to be governed by English law, is, by another part of the contract, to be null and void and of no effect. If so, the condition justifying leave to issue this writ was not fulfilled, and the decision of STABLE, J., was correct. E This result may be hard for the plaintiffs. So far as one can ever impute a common intention to the parties to a verbose and illegible bill of lading, I should suspect that they intended cl. 16 to have its manifest and simple meaning, and that it was *per incuriam* that they added as a further part of the contract the nullifying stipulation in sect. 9 of the Act, while all F they were really concerned about was to add the provisions of the schedule. However, the contract is as the plaintiffs issued it and the defendants accepted it, and its terms must prevail, with this possibly lucky result for the defendants. This appeal must be dismissed with costs.

It is unnecessary to express any opinion on the second question, as to G which *Logan* v. *Bank of Scotland* (*No.* 2) (2) and other cases were cited to us. It is apparent that, if the case were tried in England, evidence from Australia would be needed, and, if it were tried in Australia, much evidence from England would be necessary. In either case there must be inconvenience to one side.

H

LUXMOORE, L.J.: I agree that this appeal fails and should be dismissed. The question to be determined is whether the court has jurisdiction to allow a writ to be issued out of the jurisdiction of the English courts at the instance of the Ocean Steamship Co., Ltd., a company incorporated with limited liability under the English Companies

Acts and domiciled here, against the Queensland Wheat Board, a corporate body domiciled in Austalia, and, therefore, outside the jurisdiction of the English courts. The answer to the question depends upon the meaning of R.S.C., Ord. 11, r. 1 (*e*) (iii), which provides as follows :

> Service out of the jurisdiction of a writ of summons . . . may be allowed by the court or a judge whenever . . . (*e*) The action is one brought against a defendant . . . to recover damages . . . for . . . the breach of a contract . . . (iii) by its terms or by implication to be governed by English law. . . .

It is admitted that, unless the case falls within the words I have read, there is no jurisdiction in the present case to allow the writ to be issued and served out of the jurisdiction.

The plaintiffs and the defendants entered into three separate contracts for the carriage of a large number of bags of wheat by the Nestor, a vessel belonging to the plaintiffs, from Brisbane, Australia, to Liverpool or Glasgow. The contracts are contained in three bills of lading, each dated Brisbane, May 17, 1939, and delivered to, and accepted by, the defendants. All of the bills of lading, so far as the parts material to be considered in this appeal are concerned, are in identical terms. The bags of wheat were shipped at Brisbane in due course, and were duly discharged as to part at the port of Liverpool and as to all the remainder at the port of Glasgow. The plaintiffs allege that the wheat, when it was shipped, was infested with weevils, and, consequently, fell within the description "dangerous goods," within the meaning of Art IV, r. 6, of the schedule to the Australian Carriage of Goods by Sea Act, 1924. They further allege that the wheat so infested caused damage to certain parcels of flour which were being carried on the same ship, and they claim that the defendants are therefore liable for damages and expenses directly or indirectly arising out of, or resulting from, the shipment of the wheat.

Having obtained leave on Apr. 12, 1940, from the registrar of the Liverpool District Registry to issue a writ of summons and to serve it out of the jurisdiction, the plaintiffs issued the writ on the same day. On June 28, 1940, the solicitors for the defendants accepted service of the writ on their behalf and undertook to enter an appearance in due course. Appearance was subsequently entered on Sept. 4, 1940, in the following form :

> Enter a conditional appearance for the Queensland State Wheat Board the defendants in this action without prejudice to an application (i) to set aside the writ and service of the writ, and (ii) to discharge the order authorising such service.

On Sept. 12, 1940, the defendants applied by summons in the action for an order in accordance with the terms of the conditional appearance, and on Sept. 23, 1940, the district registrar dismissed this application. The defendants appealed to Stable, J., who, on Oct. 24, 1940, allowed the appeal and directed that the order for the service of the writ out of the jurisdiction be set aside. He gave leave to appeal to this court, and, in accordance with such leave, the plaintiffs have entered this appeal.

There is no note of the judgment of Stable, J., but I understand that he directed that the order for service out of the jurisdiction should be set aside because, in his opinion, the contracts in question were governed, not by English law, but by Australian law. I understand that the plaintiffs, both before the registrar and before STABLE, J., relied on two points. First they claimed that the contract was by its express terms governed by English law, and, secondly, they claimed that, if it was so governed, then the court, in the exercise of the discretion conferred by R.S.C., Ord. 11, ought to allow the action to be decided in the English courts as the *forum conveniens*. I understand that the district registrar decided both points in favour of the plaintiffs. As already stated, the judge overruled the decision of the district registrar on the first point, and expressed the opinion that, if he had taken a different view with regard to it, he would not have thought it right to interfere with the manner in which the district registrar had purported to exercise the discretion.

The main point to be determined is whether the judge was correct in holding that there was no jurisdiction to make the order because the contract was not, by its terms or by implication, to be governed by English law. As LORD ATKIN said in *R.* v. *International Trustee for Protection of Bondholders Aktiengesellschaft* (3), at pp. 529, 530:

> The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract if any, which will be conclusive. If no intention be expressed the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion the court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law: *e.g.*, the country where the contract is made, the country where the contract is to be performed, if the contract relates to immovables the country where they are situate, the country under whose flag the ship sails in which goods are contracted to be carried. But all these rules but serve to give *prima facie* indications of intention: they are all capable of being overcome by counter-indications, however difficult it may be in some cases to find such. The principle of law so stated applies equally to contracts to which a sovereign state is a party as to other contracts.

Accordingly, it is necessary in the present case to consider the terms of the bills of lading. The last term in the bills of lading—namely, that contained in cl. 16 thereof—is as follows:

> The contract evidenced by this bill of lading shall be governed by the law of England.

Plainly, if this clause stood alone and there were no provision in the contract to contradict it, it would be decisive of the matter. This, however, is not the fact, for cl. 1 of the bills of lading, so far as is material, provides as follows:

> All the terms, provisions and conditions of the Australian Carriage of Goods by Sea Act, 1924, and the schedule thereto are to apply to the contract contained in this bill of lading; and the carrier is to be entitled to the benefit of all privileges, rights and immunities contained in such Act and the schedule thereto as if the same were herein specifically set out. If anything herein contained be inconsistent with the said Act and schedule it shall, to the extent of such inconsistency and no further, be null and void.

To give effect to this provision, it is necessary to read into the contract the whole of the Australian Carriage of Goods by Sea Act, 1924, including the schedule to it, not as an Act of the Australian legislature, but as if all the words of that Act and the schedule to it were written out at length in the bill of lading as constituting part of the contract therein contained: *per* LORD ESHER, M.R., in *Dobell & Co.* v. *Rossmore S.S. Co.* (1), at p. 412. If this be done, the bill of lading must be read as containing these words of sect. 9, which are, as far as this case is concerned, the material words of the clause: A

> All parties . . . shall be deemed to have intended to contract according to the laws in force at the place of shipment and any stipulation or agreement to the contrary . . . shall be null and void and of no effect.

The place of shipment under the bills of lading in the present case was Brisbane. To my mind, the only meaning which the words "All parties B shall be deemed to have intended to contract according to the laws in force at the place of shipment" are capable of having is that the contract is to be governed by the laws in force at Brisbane—namely, Australian law. No doubt, if sect. 9 of the Act had stopped there, it would have been difficult to determine the precise meaning and intention of the parties C but it did not. The words "any stipulation or agreement to the contrary . . . shall be null and void and of no effect" are part of the section. The words of cl. 16 of the bills of lading cannot fairly be said not to be a stipulation or agreement to the contrary of that contained in the first part of sect. 9, and, consequently, cl. 16 must, on the express words contained D in the latter part of the section, be treated as "null and void and of no effect," and must, therefore, as a matter of construction of the contracts, be ignored, with the result that the contracts are to be governed, according to the true meaning of the parties as expressed in the contracts, by Australian law. It follows, therefore, that the contracts cannot be E brought within the material words of R.S.C., Ord. 11, r. 1 (*e*) (iii), and there is no jurisdiction in the court or a judge to consider whether or not the directions conferred by the order should be exercised. Speaking for myself, I do not consider it necessary to consider whether—assuming, contrary to the opinion which I have already expressed, that the jurisdiction existed—the court ought to exercise it in favour of the plaintiffs, F because no useful purpose would be served by such consideration. I agree that the appeal ought to be dismissed, with the usual consequences.

DU PARCQ, L.J.: I agree that this appeal should be dismissed. As G I understood the argument on behalf of the appellants, it conceded that full effect must be given to cl. 1 of the bill of lading. In order to reconcile the apparent conflict between cl. 1 and cl. 16, counsel for the appellants had recourse to the elementary principle of English law that, in construing a contract, effect must be given to the intention of the parties, so that, H if the parties have agreed that the law of another country shall be the law of the contract, English law will, as a general rule, give effect to that agreement. He asks us to read cl. 16 as merely importing this principle into the contract. This may be a possible construction, and is perhaps the only possible construction which comes near to making sense of the contract contained in the bill of lading. My difficulty has been to see why it is suggested that this construction leads to the desired conclusion. To my mind, it is impossible to say that English law "governs" the contract in any practical or real sense when the only function of the English law is to direct that the relevant Australian law must prevail. Moreover, I have always supposed that the justification of R.S.C., Ord. 11, r. 1 (*e*) (iii), is to be found in the fact that, where parties have agreed that their contract shall be governed by English law, it is convenient that courts familiar with that law should interpret and enforce the contract. It clearly cannot be said that English courts are more familiar with the Australian Carriage of Goods by Sea Act, 1924, or better able to interpret it than the courts in Australia.

In truth, the appellants' argument seems to me to be an example of curiously inverted reasoning. If the geographical situation of the parties were reversed, and if an application had been made in Australia for leave to serve the writ on a defendant in England, then (assuming that R.S.C., Ord. 11 has its counterpart in Australia) the courts of the Dominion might well have said that the contract was "by its terms to be governed by Australian law," and perhaps might have been justified in disregarding cl. 16 as hardly affecting the question. To put the same point in another way, if the parties before us were the same as they are now, but the contract different, so that cl. 1 of the bill of lading incorporated the provisions of Carriage of Goods by Sea Act, 1924, and cl. 16 said that the contract was to be governed by the law of Australia, the plaintiffs, though I do not say that they would certainly succeed, would at any rate have much stronger grounds for their contention that the contract was in truth governed by English law.

I wish to add that, if I had thought it possible to say that the appellants had succeeded in bringing themselves technically within the words of the rule, I should have been little disposed to regard this as a case in which the court should exercise its discretion in their favour, or, in the words of R.S.C., Ord. 11, r. 4, as a proper case for service out of the jurisdiction. It should never be forgotten that the jurisdiction which the legislature has permitted our courts to assume over persons who are physically outside their jurisdiction and are often the subjects of foreign states must always be exercised with discrimination and with scrupulous fairness to the defendants. We were properly referred to the judgment of Farwell, L.J., in *The Hagen* (4), at p. 201, from which it appears that the view expressed by Pearson, J., in *Société Générale de Paris* v. *Dreyfus Bros.* (5), at p. 242, was approved by this court. It is, indeed, as Pearson, J., said, always a very serious question whether "a foreigner who owes no allegiance here" should be put to "the inconvenience and annoyance of being brought to contest his rights in this country." Counsel for the appellants at one time seemed to suggest that a subject of the Crown domiciled in one of the Dominions was not to be regarded with the same consideration as a foreigner, but this suggestion, I think, cannot be seriously entertained. The comity which prevails between friendly nations is not excluded by the fact that each forms part of the British Commonwealth. Comity is not incompatible with kinship.

It may be observed that, if the parties had wished to confer jurisdiction on the courts of this country, or to agree that service of a writ might be effected in Australia, there would have been nothing—in the English law, at any rate—to prevent them from inserting a term in this contract to that effect. Indeed, R.S.C., Ord. 11, r. 2A, expressly provides for such agreements. No term of the kind is to be found in the contract, and, even if cl. 16 stood alone, it could not, in my opinion, be read as impliedly conferring jurisdiction. It would merely have the effect of making it possible, though not certain, that the English courts would assume jurisdiction. It is unnecessary to consider in the present case whether or not the English courts would give effect to the provisions of the Australian Carriage of Goods by Sea Act, 1924, s. 9, if they were not incorporated in the contract between the parties. In my judgment, STABLE, J., came to the right decision, and the appeal fails.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Bentleys, Stokes & Lowless* (for the appellants); *Gregory, Rowcliffe & Co.*, agents for *Laces & Co.*, Liverpool (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

HORN *v.* SUNDERLAND CORPORATION.

[KING'S BENCH DIVISION (Atkinson, J.), **December 18, 19, 1940.]**

Compulsory Purchase—Local authority—Land acquired for housing—Asssessment of compensation—Compensation for disturbance of business—Notice to treat—Variance in description of property—Separate notices to treat as to land and minerals—Award of one sum—Acquisition of Land (Assessment of Compensation) Act, 1919 (*c.* 57), *s.* 2 (2), (6).

The applicant was the owner of a farm known as Springwell Farm, which the corporation were purchasing compulsorily as a building site under the powers given to them by the Housing Act, 1936. There were some gravel, sand and limestone beneath the surface of the land. The land had been used by the applicant in connection with his business of horse-breeding. For the purpose of the compulsory acquisition, the corporation had served two notices to treat, one in respect of the land and the other in respect of the minerals. The question of compensation was referred to arbitration, and the arbitrator assessed the compensation under both notices in one sum of £22,700. He stated that he did not include any sum for the disturbance of the claimant's business, because the sum of £22,700 could be realised only by selling in the open market with vacant possession. In the notices the property was described as Springwell Farm, and in the award it was described as Springwell House Farm:—

HELD: (i) the difference between the description of property in the notices and that in the award did not vitiate the award.

(ii) although there were two notices to treat, an award of one sum was good.

(iii) in the assessment of the compensation under the Acquisition of Land (Assessment of Compensation) Act, 1919, the applicant was entitled to compensation for the loss occasioned by disturbance of his business as well as to the value of the land valued as a building site.

[**EDITORIAL NOTE.** The real question in this case is whether, when the land is valued as a building site, the owner can also obtain compensation for disturbance. It was argued that the owner could obtain the full building value of the land only if he vacated it and handed it over to the purchaser for the purpose of building on it. This argument does not take into account the fact that the purchase is compulsory and not voluntary. Although, under r. (1), no allowance is to be made on account of the acquisition being compulsory, it is held that, under rr. (2) and (6), the compensation for disturbance can be properly awarded.

AS TO COMPENSATION FOR COMPULSORY PURCHASE OF LAND, see HALSBURY, Hailsham Edn., Vol. 6, pp. 46-48, paras. 44, 45; and FOR CASES, see DIGEST, Vol. 11, pp. 291-294, Nos. 2184-2225.]

Case referred to:

(1) *Mizen Bros.* v. *Mitcham Urban District Council* (1929), Estates Gazette Digest 1929, p. 258; reprinted Estates Gazette, Jan. 25, 1941, p. 102.

NOTICE OF MOTION asking the court to refer back to an official arbitrator an award made on May 16, 1940, assessing the compensation payable on a compulsory purchase of land by the Sunderland Corporation, on the grounds that it appears from the award itself that the arbitrator awarded nothing for disturbance of the business carried on by the owner, Horn, on the land, and that he has refused to award such compensation on the ground that it is not recoverable in law. The facts are fully set out in the judgment.

G. D. Squibb for the applicant.

Dr. J. Charlesworth for the respondents.

Squibb: The official arbitrator misdirected himself in considering together the questions of compensation for land taken and compensation for disturbance. The two questions are entirely distinct. Compensation for disturbance is payable in lieu of the damages for trespass which would be payable if the entry were not made under statutory powers. The measure of compensation for land taken is the value of the land in the open market, but it is provided by the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2 (6) that this does not affect the payment of compensation for disturbance. The official arbitrator apparently relied on *Mizen Bros.* v. *Mitcham Urban District Council* (1). The note of this case in CRIPPS ON COMPENSATION does not support the official arbitrator's decision. What was claimed here was not the cost of clearing the site to make it available for building. The view taken by the official arbitrator would be equally applicable to a case where the land had a value for agricultural purposes only, since an owner occupier could not realise that value without giving up possession. Likewise, if the official arbitrator's view were correct, no compensation would ever be payable for severance, since the value of the land taken could not be obtained without severing it from the remainder.

Charlesworth : Since the owner could not have realised the value of the land—that is to say, he could not have sold it at the price awarded—without suffering the admitted disturbance of the business, to give, in addition to the value, compensation for disturbance would be to put him in a better position than if he had sold it voluntarily. *Mizen Bros.* v. *Mitcham Urban District Council* (1) and the note thereon in CRIPPS A
ON COMPENSATION, p. 271, support this contention.

ATKINSON, J. : This is a notice of motion asking the court to refer back to an official arbitrator an award made on May 16, 1940, assessing the compensation payable on a compulsory purchase of land by the Sunder- B
land Corporation, on the grounds that it appears from the award itself that the arbitrator has awarded nothing for disturbance of the business carried on by the owner, Horn, on the land and that he has refused to award such compensation on the ground that it is not recoverable in law. It appears from the award that the reason why, in the arbitrator's C
view, the compensation for disturbance is not recoverable is that the value which he has awarded for the land would not, and could not, be recovered on an actual sale without giving vacant possession of the land and suffering disturbance of the business. In other words, the award on the face of it shows that the arbitrator has decided that there cannot be D
a claim for disturbance of the business carried on by the owner on land where the selling value of the land is awarded, for the reason that the price could not be realised on a sale without giving vacant possession and suffering the disturbance. The terms of the award are these :

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> I assess the compensation payable to the claimant in respect of the acquisition of his interest in the lands above described at the sum of £22,700. The said sum of £22,700 does not include any sum as compensation for the disturbance of the claimant's business by reason of his dispossession of the land. I find that the sum so assessed could not be realised by a willing seller in the open market unless vacant possession were given to the purchaser for the purpose of building development.

The argument before me was that the owner could not have realised F
the value of the land—that is to say, he could not have sold it at the price awarded—without suffering the admitted disturbance of the business, and that to give, in addition to the value, compensation for disturbance would be to put him in a better position than if he had sold it voluntarily. I can see no very good reason why the legislature should not wish to put G
the man in a better position if his land is taken compulsorily than if he sells voluntarily. In one case it suits him, and in the other case it does not.

Compensation has to be assessed in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919. If the H
Act provided that the compensation should be such a sum as should put him in the same position as if he had sold voluntarily, that would be an end of the case, but the Act provides no such thing. It would have been perfectly simple to put that test into words, if that were the test to be applied. Under the Lands Clauses Act, it was well recognised that an

owner was entitled to compensation under three heads—namely, (i) he was entitled to the value of the land to him, (ii) he was entitled to compensation in respect of land not taken but injuriously affected by the compulsory taking, and (iii) he was entitled to compensation for disturbance of any business carried on by him on the land. There is no dispute about A those propositions. The Act of 1919 made no change as to this, except that it defined afresh the basis on which land was to be valued. Sect. 2 provides as follows :—

> In assessing compensation, an official arbitrator shall act in accordance with the following rules. . . (2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing B seller might be expected to realise. . . .

The other relevant rule is (6) which provides as follows :

> The provisions of r. (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

" Any other matter " would reserve the right to compensation for C injurious affection of land. *Prima facie*, looking at those two rules it seems very clear that the legislature is saying that the mere fact that the value of the land has been given on this basis is not to prevent a man whose business has been interfered with from claiming compensation for that disturbance and for land which has been injuriously affected.

D The land in respect of which the dispute arises is a farm of something over 100 acres. Horn had also a horse-breeding establishment. Apparently, he had a large number of horses, and bred horses, and it was in respect of the disturbance of that business that he was claiming compensation. At the arbitration it was admitted that the land had become E a valuable building site (that is why the corporation wanted to buy it, and therefore the land was valued on the basis of its having a building value, although it was occupied as a farm. It was admitted here that, if land is valued as agricultural land having no building value, the owner would also get compensation for disturbance, but why should not the F same argument exclude that in such a case ? The owner could realise the agricultural value only by giving vacant possession and by suffering disturbance. Again, it is admitted that, if there is damage due to severance, that will be recoverable, notwithstanding that the full selling value has been awarded. But why should not the argument of the G respondent exclude that ? The selling price of such land could be obtained only by somebody willing to submit to the depreciation of the value of the land not taken. I can see no reason why the argument should prevail merely because the land has a selling value for building purposes. This owner had two assets—the land worth £22,700 and a H business worth so much. If the local authority takes his land, it deprives him of land worth £22,700, and it puts him to the expense of removing his business and setting up elsewhere. In my judgment, he was plainly entitled to both the value of that of which he was dispossessed and the loss occasioned by the disturbance of his business. A test was suggested by counsel for the applicant. If trespassers had ejected Horn and seized his land and forced him to turn his horses into the road, so that he would be bound to incur expense to save them, he would have a claim for the return of the land or the value of the land, but surely he could also claim the expense to which he had been put ? At the moment he is poorer by the loss of land worth £22,700, and he is also poorer by the expense to which he has been put in dealing with his business. It seems to me that r. (6) was introduced to make it quite clear that the mere fact that an owner is getting the selling value under r. (2) is not to deprive him of his right to be compensated for disturbance of his business. I doubt whether anybody would have suggested any other view, if it were not for *Mizen Bros.* v. *Mitcham Urban District Council* (1) decided on July 19, 1929. Apparently, that was a claim for compensation by a market-gardener who had some glasshouses on his land. He had been awarded the selling value of the land, and he claimed in addition the cost of clearing the land of these glasshouses. What else he was asking for is not clear. The note in CRIPPS ON COMPENSATION, p. 271, is as follows :

> Attention, however, may be drawn to the unreported case of *Mizen Bros.* v. *Mitcham Urban District Council* (July 19, 1929). It was held by the Divisional Court that where a claim is made for compensation on the ground that land is building land, no claim can be made for business disturbance, as it must be assumed that when building land is sold at full value for building purposes the expenses of clearing such land would be deducted from the price.

It does not seem to me to follow that no claim can be made for disturbance if the decision was, in accordance with the last two lines, merely that one could not also claim the expense of clearing the land. I could understand a decision to the effect that, if one sells land and has to give vacant possession, the actual expense of pulling down and removing the glasshouse may be an expense which one is not entitled to recover. If the decision went further than that, not having seen the arguments nor what the court said, I do not see how it can be reconciled with r. (2) and r. (6). After all, it would cost nothing to give vacant possession of this land. The man could move his horses into the road, and there is the vacant possession. That would cost nothing. In my judgment, however, it cannot be right to say that, merely because his land has a selling value which he could not get without giving vacant possession. that disentitles him to compensation for the disturbance of his business, the cost to which he is put in establishing it elsewhere, or any adverse effect consequent upon the removal.

Therefore, in my judgment, this appeal succeeds and I order that the case be remitted to the official arbitrator, with the direction that he assess the loss occasioned by the disturbance of the applicant's business. I cannot give further direction than that, because I know so little about what the claim was, or how it was made. The arbitrator will be better able to deal with it. The only point upon which he will want direction is that this is a loss which is recoverable and that he was wrong in thinking that it was not.

The first ground of the notice of motion is as follows:

> . . . the property forming the subject-matter of the arbitration is not described correctly in the award and does not agree with the notices to treat.

I really cannot see what there is in that. The land is described as "Springwell Farm or Springwell House Farm." The words "Springwell House Farm" do not appear in the notice to treat, but it is perfectly plain that it is referring to the same land. I do not think that there is anything in that point. The third ground is as follows:

> . . . the award does not specify the separate assessments in respect of each notice to treat.

To explain that point, it is necessary to say this. There were two notices to treat. On Aug. 20, 1936, there was a notice to treat in respect of the land. This land contained gravel and limestone quite near the surface, of course, and on May 17, 1937, a second notice to treat was given in respect of the gravel and sand and limestone. The arbitrator was appointed to deal with both claims and the arbitrator did deal with both claims, and he awarded nothing in respect of the claim for what are called minerals—namely, the sand and gravel—for the very obvious reason that one could not sell the land as building land and also remove the sand and gravel. Very properly, he thought that Horn could not get that as well. If he had valued it as agricultural land, very likely there would have been something given for the so-called minerals, but, as he valued it on the basis of its being a building estate, quite properly there could be no compensation for that. It is quite true that the award did not say what he had done with regard to the minerals. He merely awarded the £22,700 and explained that that contained nothing for disturbance of the business. After the award was published, Horn's solicitors wrote asking the arbitrator if he would specify the amount awarded in respect of Horn's claim as to the land the subject of the notice to treat dated Aug. 20, 1936, and also the amount awarded in respect of his claim as to the minerals the subject of the notice to treat dated May 13, 1937. The request was made in pursuance of sect. 3 (3) of the Act of 1919, which provides as follows:

> The official arbitrator shall, on the application of either party, specify the amount awarded in respect of any particular matter the subject of the award.

The arbitrator replied as follows:

> The amount awarded includes no separate value for the minerals apart from the value of the land in which they are comprised.

That was perfectly intelligible, and I see no ground for setting aside this award or remitting it on the third ground in the notice of motion, but I think that it must go back on the main ground, which has been argued here. The respondents must pay the costs of this special csae.

Appeal allowed with costs. Case remitted to official arbitrator with direction to assess loss occasioned by disturbance of applicant's business.

Solicitors: *Maples, Teesdale & Co.*, agents for *Steel, Maitland & Byers*, Sunderland (for the applicant); *Sharpe, Pritchard & Co.*, agents for *G. D. McIntire*, Town Clerk, Sunderland (for the respondents).

[*Reported by* L. J. SOLLEY, ESQ., *Barrister-at-Law.*]

SUGAR *v.* LONDON, MIDLAND & SCOTTISH RY. CO.

[King's Bench Division (Viscount Caldecote, L.C.J.), **December 5, 6, 11, 1940.]**

Carriers—Carriage of passengers—Passenger ticket—Conditions—Notice to passenger—Notice obliterated by date stamp.

On Dec. 28, 1939, the plaintiff and her husband took tickets to Westcliff from the defendant railway company, and, on arrival at Westcliff, the plaintiff, preceding her husband along an ill-lit passage towards the exit of the station, fell into a hole made by workmen executing repairs, and thereby sustained injury. The tickets which had been purchased for this journey had the date stamped on them in such a way as to obliterate the words " For conditions see back " :—

Held : by reason of the obliteration of the words on the ticket " For conditions see back," there was no proper notice of the conditions governing the carriage of passengers.

[EDITORIAL NOTE. The line of cases dealing with tickets bearing the words " For conditions see back " had not, until the decision herein, included a case where those words had been accidentally obliterated by the stamping of the date upon the ticket. What is necessary in such a case is that the railway company shall do what is reasonably necessary to bring the conditions to the notice of the passenger. It is well-settled that, by the mere printing of the notice, they have done all that is in law required of them, but it is here held that the accidental obliteration prevents the printing of the words from being a sufficient notice to the passenger of the conditions.

As to Conditions on Tickets, see HALSBURY, Hailsham Edn., Vol. 4, pp. 72, 73, para. 109 ; and for Cases, see DIGEST, Vol. 8, pp. 103-105, Nos. 687-697.]

Cases referred to :

(1) *Parker* v. *South Eastern Ry. Co.*, *Gabell* v. *South Eastern Ry. Co.* (1877), 2 C.P.D. 416 ; 8 Digest 129, *866* ; 46 L.J.Q.B. 768 ; 36 L.T. 540.

(2) *Henderson* v. *Stevenson* (1875), L.R. 2 Sc. & Div. 470 ; 8 Digest 127, *855* ; 32 L.T. 709.

(3) *Nunan* v. *Southern Ry. Co.* [1924] 1 K.B. 223 ; 36 Digest 135, *896* ; 93 L.J.K.B. 140 ; 130 L.T. 131 ; *affg.*, [1923] 2 K.B. 703.

(4) *Penton* v. *Southern Ry.*, [1931] 2 K.B. 103 ; Digest Supp. ; 100 L.J.K.B. 228 ; 144 L.T. 614.

(5) *Hood* v. *Anchor Line* (*Henderson Brothers*), [1918] A.C. 837 ; 8 Digest 104, *695* ; 87 L.J.P.C. 156 ; 119 L.T. 684.

Action for damages for personal injuries sustained by the plaintiff by reason of the defendants' alleged negligence in leaving unguarded a hole in a passage of a railway station, so that the plaintiff fell into the hole while she was leaving the station. It was found as a fact that the passage was badly lighted and that no proper notice of the danger was given. The question then arose whether sufficient notice was given of the conditions subject to which the ticket was issued. The ticket bore on its face the words, " For conditions see back," but these words had been obscured in placing the date upon the ticket.

Cecil R. Havers, *K.C.*, and *H. J. Astell Burt* for the plaintiff.

Patrick A. Devlin for the defendants.

Viscount Caldecote, L.C.J. : The question here is whether or not the plaintiff can recover, having regard to the conditions which are on the back of the railway ticket referring passengers to conditions contained in the railway time-tables and bills and protecting the defendants against claims for damages for negligence. The specimen ticket which I have, contains these words on the front of it; "For conditions see back. Day Excursion." On the ticket which was issued to the plaintiff's husband, the words "For conditions see back" were blotted out by the date stamp, which is put on the face of the ticket lengthwise.

The question then arises as to whether, in those circumstances, to take the question which was said in *Parker* v. *South Eastern Ry. Co.* (1) to be the right question for the jury, the company did that which was reasonably sufficient to give the plaintiff notice of the conditions. If the words had been left clear, I should have come to the conclusion, on a good deal of authority—the authorities are beyond dispute—that the plaintiff was bound by the conditions even though she and her husband could not read, which I am told is the fact. Counsel for the defendant says that it makes no difference if the words "For conditions see back" are not on the face of the ticket, or if they are obscured or blotted out. I have been referred to a few of the very numerous cases on this subject. The earliest of them, I think, is *Henderson* v. *Stevenson* (2), but all these cases proceeded upon the view which is now quite clearly established, and has not been disputed by counsel for the plaintiff, that a contract of a rather artificial nature between a railway company and a passenger can be made in this rather artificial manner by giving notice on the ticket and calling the passenger's attention in a reasonable way to the conditions on the ticket and in the time-tables of the company. *Henderson* v. *Stevenson* (2) was decided many years ago, and, as has been pointed out in cases to which I have been referred, it was a case decided on its special facts. Let me say here that each case must depend upon its facts. I have to decide this question on the facts in this case, and I have come to the conclusion that, on the facts in this case, the railway company did not do that which was reasonably sufficient to give the plaintiff notice of the conditions.

In *Parker* v. *South Eastern Ry. Co.* (1), decided as long ago as 1877, MELLISH, L.J., in giving the judgment of the court, said, at p. 423:

> The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness.

As I have suggested, the atmosphere in which these cases are decided is rather unreal, but, nevertheless, the legal position is perfectly plain.

Now I was referred to two cases in which SWIFT, J., gave judgment. One was *Nunan* v. *Southern Ry. Co.* (3), in which SWIFT, J., said, at p. 707:

> . . . if there be an issue as to whether the document does contain the real intention of both the parties the person relying upon it must show either that the other party knew that there was writing which contained conditions or that the party delivering the form had done what was reasonably sufficient to give the other party notice of the conditions, and that the person delivering the ticket was contracting on the terms of those conditions.

Thus I come back to the question in *Parker* v. *South Eastern Ry. Co.* (1) ——namely, has the railway company done that which was reasonably sufficient to bring the conditions to the notice of the intending passenger ? The whole question turns upon the importance in this case of the one fact which takes it out of the line of cases decided in favour of the railway companies—namely, the fact that there was nothing on the face of the ticket to indicate to the passenger that he must look on the back, or must look in the company's time-tables, to see the special conditions which attached to his journey.

The second case which SWIFT, J., decided was *Penton* v. *Southern Ry.* (4), in which SWIFT, J., said, at p. 109 :

> Then the question arises, have the railway company taken all reasonable steps to bring [the conditions] to his notice ? In truth, what had happened was that the railway company had given him a ticket. The most obvious matter upon the front of the ticket was the statement that for the conditions one must see the back. The words, " For conditions see back," are certainly plainly visible upon the front of the ticket. They are as clear to my eye as are the names of the places between which the ticket is issued, and more clear than anything else . . .

I cannot read that passage without inferring that SWIFT, J., thought that it was the presence of those words clearly printed on the front of the ticket which justified a conclusion that the railway company had done that which was reasonably sufficient to bring the conditions to the notice of the railway passenger. In this present case, those words were not there. They were obliterated, and I think that, on the facts of this case, the right conclusion is that the railway company did not take reasonable steps to bring the conditions to the notice of the passenger, for the obvious reason that it is no use printing words in much clearer type than anything else printed on the ticket if the next thing they do is to blot those words out. The words were there for a purpose, and I think that they were there for the reason that it was necessary for the railway company to call the passenger's attention to the fact that there were special conditions. It is not necessary for me to say for a moment that the plaintiff or her husband would have done anything different from what they did if the words had not been blotted out. In fact, the railway company did not take what I think were reasonably sufficient steps, and, therefore, there was no term in the contract between the plaintiff and the railway company which prevents the plaintiff from recovering in this action.

The passage in *Hood* v. *Anchor Line* (*Henderson Brothers*) (5), to which I called attention in the course of the argument, seems to be authority for the opinion I have formed on the facts of this case, that, if there were no words, as there were not in *Henderson* v. *Stevenson* (2), on the front of the ticket, then reasonably sufficient steps were not taken to bring the conditions to the notice of the railway passenger. For these reasons, I have come to the conclusion that the plaintiff is not debarred by the conditions which are contained in the railway company's time-tables, under which they would not be liable. She is entitled to damages. The special damages have been conveniently agreed at the sum of £37 10s.

The accident took place just a year ago, but the plaintiff is still suffering from some lameness, and I think that, taking everything into consideration, she should receive a sum of £200 as fair compensation for the pain she has suffered and the injury inflicted upon her by reason of this unfortunate accident. Therefore, there will be judgment for the plaintiff for A £200 with costs.

Judgment for the plaintiff for £200 *and costs.*

Solicitors: *Levy & Co.* (for the plaintiff); *Alexander Eddy* (for the defendants).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*] B

C

J. WHARTON (SHIPPING), LTD. *v.* MORTLEMAN AND ANOTHER.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J.), **November 28, 29, December 10, 1940.]**

D *Insurance—Marine insurance—War risks—Collision with requisitioned ship—Requisitioned ship proceeding to be used as transport.*

The Brendonia was insured under one policy insuring against marine perils, and was insured under another policy against war risks. The ship, when at anchor in the Downs, was struck by another ship on September 11, 1939, and became a total loss. The second ship was E one requisitioned by His Majesty's government on Sept. 3, 1939, and ordered to go to Southampton for orders. At the time of the collision, the second ship was proceeding to Southampton as ordered, and it was the intention of the government to employ her, after her arrival at Southampton, for Army transport purposes. It was contended that the second ship was engaged in a warlike operation and that the loss fell upon the underwriters of the war risks policy:—

F HELD: the second ship was not engaged in a warlike operation, and the loss fell upon the underwriters of the policy insuring against marine perils.

[**EDITORIAL NOTE.** The court in this case was asked to go one step further than it has previously been asked to go, and to decide that a ship is engaged in warlike operations from the time she is chartered, although she may have to make G a preliminary voyage to reach the port at which her actual war work is to commence. It was said that there was support for this view in the *Petersham* and *Matiana* cases (2), but the court has decided against this contention.

AS TO WARLIKE OPERATIONS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 316, 317, para. 441; and FOR CASES, see, DIGEST, Vol. 29, pp. 226-230, Nos. 1836-1861.]

H

Cases referred to:

(1) *British & Foreign S.S. Co.* v. *R.*, [1918] 2 K.B. 879; 29 Digest 228, *1849*; 87 L.J.K.B. 910; 118 L.T. 640.

(2) *Britain S.S. Co.* v. *R.*, *Green* v. *British India Steam Navigation Co.*, *British India Steam Navigation Co.* v. *Liverpool & London War Risks Insurance Assocn.*, [1921] 1 A.C. 99; 29 Digest 230, *1860*; 89 L.J.K.B. 881; 123 L.T. 721; *affg.*, [1919] 2 K.B. 670.

(3) *A.-G.* v. *Ard Coasters, Ltd., Liverpool & London War Risks Insurance Assocn., Ltd.* v. *S.S. Richard De Larrinaga Marine Underwriters,* [1921] 2 A.C. 141; 29 Digest 228, *1851*; 91 L.J.K.B. 31; 125 L.T. 548; *affg.* S. C. *sub nom. Richard De Larrinaga (Owners)* v. *Admiralty Comrs.,* [1920] 3 K.B. 65; *affg.* S.C. *sub nom. Ard Coasters, Ltd.* v. *R.* (1919), 35 T.L.R. 604; (1920), 36 T.L.R. 555.

(4) *Commonwealth Shipping Representative* v. *Peninsular & Oriental Branch Service,* [1923] A.C. 191; 29 Digest 226, *1838*; 92 L.J.K.B. 142; *affg.* S.C. *sub nom. Re Peninsular & Oriental Branch Service* v. *Commonwealth Shipping Representative,* [1922] 1 K.B. 706. A

ACTION against the first defendant, a Lloyd's underwriter, on a policy of insurance effected for the purpose of covering the plaintiff's ship B Brendonia against total loss by perils of the sea, or, alternatively, against the second defendants, also underwriters at Lloyd's, on a war risks policy. The facts are fully set out in the judgment.

A. J. Hodgson for the plaintiffs.

Sir Robert Aske, K.C., and *Waldo W. Porges* for the first defendant. C

A. T. Miller, K.C., and *Patrick A. Devlin* for the second defendants.

VISCOUNT CALDECOTE, L.C.J.: This case raises once more a question concerning the incidence of risks as between marine and war risk underwriters in respect of a ship requisitioned by the government. The plain- D tiffs, the owners of the motor vessel Brendonia, brought their action against the first defendant for a total loss by perils of the seas under a policy of marine insurance. The first defendant by his points of defence admitted the total loss of the Brendonia, while denying that she was lost by any perils insured against. He alleged that the loss was caused or E contributed to by the negligent navigation of the Alderpool, and, further, that the Alderpool was engaged upon a warlike operation, so that the loss of the Brendonia was not a marine risk, but was a war risk. Thereupon the plaintiff amended his writ and points of claim, and claimed alternatively against the second defendants for a total loss under a war risks F policy of insurance.

At the time of her loss, the Brendonia was insured with the first defendant and other underwriters at Lloyds against the ordinary marine perils. The policy contained the following clause, being cl. 19 of the Institute Time Clauses: G

> Warranted free of capture seizure arrest or detainment and the consequences thereof or of any attempt thereat: also from the consequence of hostilities or warlike operations.

She was also insured at the same time with the second defendant under a war risks policy covering:

> . . . the consequences of hostilities or warlike operations by or against the King's enemies. H

The interest of the plaintiffs was admitted by both defendants.

On Sept. 11, 1939, the Brendonia, which, in the course of a voyage down the east coast, had come to anchor in the Downs near the Gull Buoy, was struck by the steamship Alderpool and sunk. The Alderpool had been requisitioned by His Majesty's Government on Sept. 3 and ordered to Southampton for orders. On the night of the collision, she was proceeding from the Tyne to Southampton. It was the intention of the government to employ her after arrival at Southampton in transporting army vehicles and petrol to Brest, where personnel were waiting to man the vehicles. The master of the Alderpool was not aware of the purpose for which she was to be used. At about 3.15 a.m. on Sept. 11, she was steaming at slow speed, without lights, and working up to an anchorage close to the North Goodwin Buoy, which was rather more than a mile distant from the Gull Buoy, when she collided with the Brendonia, then at anchor.

The question which arises for my decision is whether or not the Alderpool was engaged in a warlike operation when she collided with the Brendonia. The Brendonia plainly was not so engaged. If this question were to be considered apart from authority, it might seem a little startling to suggest that at the time of the collision the Alderpool was engaged in a warlike operation. She was not carrying war personnel or war material. She was not a combatant unit, nor was she performing any of the duties of a warship, such as patrol, or the search for enemy ships or aircraft. She was proceeding to Southampton as an ordinary merchant ship, except for the fact that she was steaming without lights. Further, at the time of the collision, she was proceeding slowly to work up to an anchorage in the Downs. The facts, however, including the fact that she was going to Southampton for orders which would result in her use as a ship to carry war material to Brest, must be considered in the light of a number of relevant decisions, many of them in the House of Lords.

It is possible at once to dispose of any suggestion that the mere fact that the Alderpool was carrying no lights justifies a finding that she was conducting a warlike operation. In the case of the steamship St. Oswald, *British & Foreign S.S. Co.* v. *R.* (1), the Attorney-General did not dispute that the sailing without lights was a military operation, and it seems to have been on the basis of this admission that the Court of Appeal held that the collision in that case was caused by a war risk. Later decisions, however have made it plain that, though steaming without lights and at full speed, may be, and often is, material in arriving at the cause of a loss, it is not a ground on which—at any rate, if it is the only ground—it can be said that there was a warlike operation: *Britain S.S. Co.* v. *R.* (2) and *A.-G.* v. *Ard Coasters, Ltd.* (3). The first defendant, indeed, did not contend otherwise. The case presented on his behalf was that, inasmuch as the Alderpool was on her way to a port for orders, and it was intended to use her, when she arrived, for a purpose which would constitute a warlike operation, she was as much engaged in a warlike operation before she reached the port as she would be after she had loaded war material for carriage to Brest. I am ready to assume that Brest was a war base—that is to say, a place from which reinforcements or supplies were provided for an army in the field, or where troops or war materials were assembled for the purpose of actual operations in the field. If it were necessary for the purposes of this case to decide that Brest was a war base at all material times, I should so hold. I think that it would be pedantic to say that evidence must be given to prove so notorious a fact, though I have not forgotten, nor, I think, transgressed, what was said in the House of Lords in *Re Peninsular & Oriental Branch Service & Commonwealth Shipping Representative* (4) as to the limits of judicial notice. A

Therefore, assuming Brest to have been a war base, and accepting, as I do, the submission of counsel for the first defendant that, when the Alderpool was engaged in carrying war material to Brest, she would be engaged in a warlike operation, I am invited to carry the matter a step further. I am asked to say that the voyage from the Tyne to Southampton was part of the same operation. Authority for this is said to be found in the reasoning of some of the opinions in the House of Lords in cases to which I will refer. The first citation was from the *Petersham* and *Matiana* cases (2), where VISCOUNT CAVE, L.C., referred to *British & Foreign S.S. Co.* v. *R.* (1) and said, at p. 109, that the St. Oswald and the French battleship Suffren with which she collided were both proceeding to evacuate troops from Cape Helles, and were, therefore, very plainly engaged in warlike operations. Counsel for the first defendant relied on this as authority for the proposition that a ship which is on her way to take on board troops or war material is just as much engaged in a warlike operation as is a ship which is actually engaged in the transport of troops or war material. I think that this is overstraining the language used by VISCOUNT CAVE, L.C. On the facts of that case, there was ground, quite apart from the Attorney-General's admission, for coming to the conclusion that she was engaged in a warlike operation just as much as the French battleship. A statement somewhat similar to that made by VISCOUNT CAVE, L.C., is to be found in the opinion of LORD ATKINSON in the same cases, at p. 116, where he said that the St. Oswald had not got troops on board at the time of her collision with the Suffren, when, under Admiralty orders, she was hurrying at full speed to the port at which she was to take them on board. LORD ATKINSON there said : B C D E F

> This circumstance does not, in my view, alter the character of the operation she was at the time of collision performing.

I make the same comment on this passage from the opinion of LORD ATKINSON as that which I have made upon the statement of VISCOUNT CAVE, L.C. The opinions expressed by VISCOUNT CAVE, L.C., and by LORD ATKINSON as in *British & Foreign S.S. Co.* v. *R.* (1) must be considered in relation to the actual facts of that case. G

Next I was referred to passages which are to be found in the opinions of LORD FINLAY and LORD WRENBURY in *A.-G.* v. *Ard Coasters, Ltd., Liverpool & London War Risks Insurance Assocn., Ltd.* v. *S.S. Richard de Larrinaga Marine Underwriters* (3). LORD FINLAY said, at p. 151 : H

> The question which remains, and which is not absolutely covered by authority, is what is the position in such a case as the present one where one of His Majesty's

> ships is sailing at night without lights, but is not at the moment actively engaged in definite warlike operations—such as patrolling and being on the lookout for submarines, or actually convoying ships—but is proceeding to her station for the purpose of taking up her duties there as a convoying ship.

Then LORD FINLAY proceeded to decide the question by approving what ATKIN, L.J., and BAILHACHE, J., in the *Petersham* case (2) and BANKES, L.J., in the case under appeal, had said. All three observations were made with reference to warships. LORD FINLAY said, at pp. 151, 152:

> Protecting convoys is a form of warlike operation, it is an operation in the course of war necessary to be performed by war vessels for the purpose of protecting the merchantmen. I cannot separate the proceedings under orders to the spot where the duty is to be discharged from the actual discharge of the duty itself; both form part of the warlike operation. It is just as much a part of a warlike operation to get your ships or your troops to the spot where a thing is to be done as it is to do it when you get to the spot. It is said "Oh, there may be great difficulties in saying when the progress to the place of operation begins." Well, nice questions might arise in some cases, but it seems to me perfectly plain that when a war vessel is actually at sea, and is there because she is under orders to go to a particular spot to undertake a warlike operation, whatever its nature may be, she is engaged in that warlike operation, because she is doing that which is necessary to get to the spot where the actual thing is to be done.

Similarly LORD WRENBURY dealt with the question as to whether the warship in question—namely, H.M.S. Devonshire—was engaged on a war errand [p. 156]:

> . . so that she was engaged in a warlike operation at the moment when the collision occurred.

He said that there were many cases in which there might be great difficulty in answering the question whether at a particular moment a ship of war was engaged in a warlike operation, and added, at p. 156:

> I do not think it is enough to say that the ship was a warship and was proceeding under orders given by naval authority.

It is plain from the statements which I have quoted that LORD FINLAY and LORD WRENBURY were dealing with warships. LORD WRENBURY gave as illustration of his opinion that it was not enough to say that the ship was a warship, a case where a ship was under orders to go into dock to be overhauled, and was simply proceeding there. That, he said, might be different from the case where she was going to a particular place to take part in an action which was proceeding or immediately expected. In the latter case, he said, the warship would certainly be on a war errand, and engaged in a warlike operation.

I have to deal, however, not with a warship, but with a merchant ship which had been requisitioned with a view to her use in carrying troops or war material. I come back to the question: was the Alderpool engaged in a warlike operation? If I were constrained by authority to find that she was so engaged, that would be an end of the matter; but counsel for the first defendant was unable to cite any decisions or statements in support of his contention, other than those with which I have already dealt, and these I find do not cover the present case. I am free, therefore, to decide this question solely on the facts as I find them. In my judgment, the Alderpool was not engaged in a warlike operation at the time of the collision. There was nothing warlike about her or her movements or her duties. When she reached Southampton, a different set of facts was likely to arise, justifying a finding that she was then engaged in a warlike operation. That time, however, had not yet come. I am not so presumptuous as to attempt any definition of the phrase "warlike operation." Lord Sumner in the *Larrinaga* case (3) thought that such a task had better be left to those of their Lordships who would be sitting in the next war.

Having regard to my finding that the Alderpool was not engaged in a warlike operation, and there being no suggestion that the Brendonia was so engaged, there is no necessity to deal with the arguments which I heard on the question of the cause of the loss of the Brendonia. In the result, the first defendant, who is *prima facie* liable under the policy of marine insurance and can only succeed by showing that there was a loss by an excepted peril, fails. Judgment must be given for the plaintiffs against the first defendant for the sum of £69 18*s*., with interest at the rate of 3¾ per cent. from Sept. 11 to the date of payment. The first defendant must pay the costs of the plaintiffs and of the second defendants.

Judgment for the plaintiffs against the first defendant for £69 18*s*., *with interest at* 3½ *per cent. from Sept.* 11, 1939, *to date of payment. First defendant to pay costs of plaintiffs and of the second defendant.*

Solicitors: *Thomas Cooper & Co.* (for the plaintiffs); *Ince, Roscoe, Wilson & Glover* (for the first defendant); *J. A. & H. E. Farnfield* (for the second defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

MOUSER *v.* MAJOR.

[Court of Appeal (Scott, MacKinnon and du Parcq, L.JJ.), **January 16, 17, 1941**].

Landlord and Tenant—Rent restriction—Decontrol—Actual possession by landlord—Step-daughter remaining in possession on death of tenant—Break in tenancy—Rent and Mortgage Interest Restrictions Act, 1923 (*c.* 32), *s.* 2 (1).

A controlled house, on the death of the tenant, passed into the possession of his widow, who continued as tenant. Upon the death of the widow, the landlord entered into negotiations with her stepdaughter, a daughter of the tenant, and she became tenant of the premises at an increased rent. It was found as a fact that at no time had the landlord had either actual or notional possession of the property:—

Held: the premises had not been decontrolled, since the landlord had never come into possession of the property.

[**EDITORIAL NOTE.** It was argued in this case that, upon the death of the statutory tenant, there must be a lapse of time before there is a new tenant of the property, and that during this period the landlord must in law be in possession of the property. It will be remembered that it has been decided that, except for certain statutory provisions, a statutory tenancy ceases on the death of the tenant. It does not pass to the personal representative, though, under the statutory provisions, A it may pass to certain members of the deceased tenant's family. Where the new tenant is living in the property at the time of the statutory tenant's death, it was suggested that such tenant was there only as a licensee or tenant at will, and not under any then-existing contract of tenancy. It was submitted that this was so even though, for the purposes of payment of rent, the new tenancy was made to date from the decease of the statutory tenant, and it was said that the statutory tenancy had come to an end and that there was a hiatus in the tenancy which would B have the effect of decontrolling the premises. This argument is very carefully considered in the judgment of DU PARCQ, L.J., but is unanimously rejected by the court. The house here in question will, of course, now be controlled under the 1939 Act, but it was of importance to decide whether it had been decontrolled, as that would affect the determination of the standard rent.

AS TO DECONTROL, see HALSBURY, Vol. 20, pp. 319-321, paras. 379, 380; and C FOR CASES, see DIGEST, Vol. 31, pp. 585, 586, Nos. 7349-7361.]

Cases referred to:

(1) *Lloyd* v. *Cook*, *Goudge* v. *Broughton*, *Simson* v. *Miatt*, *Bartram* v. *Brown*, *Barker* v. *Hutson*, [1929] 1 K.B. 103; Digest Supp.; 97 L.J.K.B. 657; 139 L.T. 452.

D (2) *Cohen* v. *Gold*, [1927] 1 K.B. 865; Digest Supp.; 96 L.J.K.B. 419; 136 L.T. 723.

(3) *Kearns* v. *Bedford* (1934), 50 T.L.R. 348; Digest Supp.

(4) *Schaffer* v. *Ross*, [1939] 4 All E.R. 363; Digest Supp.

(5) *Pain* v. *Cobb* (1931), 146 L.T. 13; Digest Supp.

(6) *Lovibond (John) & Sons, Ltd.* v. *Vincent*, [1929] 1 K.B. 687; Digest Supp.; 98 L.J.K.B. 402; 141 L.T. 116.

E

APPEAL by the defendant from an order of His Honour JUDGE HAYDON, dated Nov. 19, 1940, and given at the Kingston-upon-Thames County Court. The facts are fully set out in the judgment of SCOTT, L.J.

S. N. Bernstein for the appellant.

F *Humfrey H. Edmunds* for the respondent.

Bernstein: Since the county court judge found as a fact that there had been no actual possession by the landlord, there can have been no decontrol. The Act of 1923 requires that there should be actual possession by the landlord. In this case, this was not only a finding of place, but G it was agreed that this was so. [Counsel referred to *Schaffer* v. *Ross* (4) and *Pain* v. *Cobb* (5).]

Edmunds: The rights of the statutory tenant are purely personal rights: *Lovibond (John) & Sons, Ltd.* v. *Vincent* (6). When the widow died, all control under the 1920 Act ceased. The appellant's occupation H of the house between the death of the widow and the time when she was accepted as tenant at £1 per week was that of a licensee. This was not a change of tenancy with the landlord's consent but was a completely new tenancy: *Pain* v. *Cobb* (5). The landlord was in possession by his licensee. [Counsel referred to *Goudge* v. *Broughton* (1) and *Kearns* v. *Bedford* (3).]

Scott, L.J.: This is a claim by a landlord for arrears of rent, the decision of which turns entirely upon the construction of the Rent Restriction Acts. When the case was tried by His Honour Judge Haydon in the Kingston-upon-Thames County Court, the judge heard very little evidence, if any, and the case was tried by him upon admissions made by counsel. He reserved his judgment, and gave a considered A judgment, in which he clearly states his findings of fact and the admissions which were made.

The question in the case is not an easy one, but, in my view, we can dispose of the case, and ought to dispose of it, upon the judgment as given, without sending it back to the county court judge to ascertain B the facts further. The question quite shortly is this. The house in question, 79, Russell Road, Wimbledon, had been let originally to a married man, who had resided there with his wife and three children. He died on Feb. 26, 1926, and his widow succeeded him as statutory tenant by reason of the provisions of sect. 12 (1) (*g*) of the Act of 1920, C which defines the expression "landlord" and then provides as follows:

> . . . the expression "tenant" includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court.

D Originally, the right of a widow was limited to the case of a tenant dying intestate, but those words were repealed by the Act of 1935. The provision about residence is subsequently subjected to a condition that the residence should have lasted for six months.

The first point in the case turns upon the question of what happens E after the death of a widow of a statutory tenant within the meaning of that section. The widow in question died on Jan. 22, 1929. All the rent was paid up to the time of her death. A stepdaughter of the widow —a married daughter of the tenant—then living in the house, and who is the defendant in the present proceedings, in fact succeeded to the F tenancy of her stepmother. The county court judge finds the facts in these terms:

> Upon the death of [the widow] the then landlord entered into negotiations with the defendant, with a view to her becoming tenant of the premises. She did become tenant at £1 per week. No furniture was at any time removed. The defendant, as it was put, took over the house "lock, stock and barrel." The landlord had at no time possession, actual or notional. G

That is practically all the information which the county court judge gives to the court in his judgment as to the facts relating to the defendant becoming tenant, except that she paid £1 per week for some time, but later was advised that she was a statutory tenant within the meaning of the Acts, and, therefore, not bound to pay more rent than had been H paid by her stepmother down to her death, which was something less than £1 per week.

After a time, the landlord started an action in the county court claiming arrears of rent, a comparatively small amount, for a certain period of time. There is no dispute about the figures. The question which the county court judge had to decide was whether the defendant was entitled to the benefit of the statutory limitation on the amount of rent, or whether she was obliged to pay the £1 which she had agreed to pay.

The county court judge recites the submissions on behalf of the defendant, and then gives a finding upon them. It is necessary to read his A own words:

> It was submitted on behalf of the defendant (i) That the burden of proving that the house was not a dwelling-house to which the principal Acts applied rested on the plaintiff—see sect. 7 (1) of the Act of 1938. That is correct and was conceded.

As the county court judge says, that section does make provision that B the burden is on the landlord to prove that the house is not a house to which the Acts apply. Then the county court judge continues as follows:

> (ii) That the predecessor in title of the plaintiff had never come into possession of the whole of the dwelling-house within sect. 2 (1) of the Act of 1923. That is correct and was conceded.

That section was subsequently repealed, but it was left to apply as at the C date when it had application before the date of the repeal. Sect. 2 (1) provides as follows:

> Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the D principal Act shall cease to apply to the dwelling-house. . . .

Sect. 2 (3) provides as follows:

> For the purposes of this section, the expression "possession" shall be construed as meaning "actual possession," and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent.

E Therefore, the question in this case before the county court judge was whether or not the landlord had come into possession of the dwelling-house. Then the county court judge continues as follows:

> (iii) That all that had happened was a change of tenancy made with the landlord's consent.

He then cites the words of subsect. (3), which I have just read, and con- F tinues as follows:

> In view of the answer to submission (ii), it does not matter whether this was so or not.

By that I understand the county court judge to mean that, it being conceded that the landlord never did come into possession, it is irrelevant G to consider whether a change of tenancy constituted such a change of possession. He continues as follows:

> But I am unable to see how it can be said that, when one tenant dies and the premises are then let to another tenant, the position can be described as a change of tenancy with the landlord's consent.

H That view may be right or it may be wrong, but, as the county court judge says, it is not really relevant to the decision of the case, because of the admission that the predecessor in title of the plaintiff had never come into possession of the whole of the dwelling-house. The county court judge continues as follows:

> (iv) That the registration of the house under sect. 2 (2) of the Act of 1933 was of no effect. That was conceded on the part of the plaintiff.

The house had been registered under that Act as decontrolled. The county court judge continues as follows:

> (v) That the recoverable rent was that paid by the [widow].

That phrase "recoverable rent" is defined in sect. 16 (1) of the Act of 1933 as meaning: A

> . . . in relation to any dwelling-house, the maximum rent which, under the provisions of the principal Acts, is or was recoverable from the tenant.

Then the county court judge continues as follows:

> That depends upon the decision of the point above referred to.

I am not quite sure which of the preceding paragraphs he refers to there, B but I think he means that the recoverable rent depends on whether the house was controlled or decontrolled. He continues as follows:

> Of course the dwelling-house is now controlled by later legislation, but it is agreed that, if the decision is against the defendant under the fifth submission, the recoverable rent is £1 per week, and no question will arise as to figures.

Using the word "recoverable," not in its statutory sense, but in the C ordinary sense of the English language, the plaintiff was entitled to recover the full rent which Mrs. Major had agreed to pay unless the house in her possession was a controlled house of which she was the tenant. The county court judge continues as follows:

> The contention of the plaintiff is that on the death of [the widow] the statutory D tenancy was finished, and that her right under sect. 12 (1) (*g*) having come to an end, the principal Act ceased to apply to the premises. That, upon the agreed facts, the onus of proving that the premises had become decontrolled was discharged.

Then he refers to the registration, with which I need not deal, and he ends his judgment as follows: E

> I am of opinion that these contentions are correct. There will accordingly be judgment for the amount claimed with costs.

It was submitted by counsel for the defendant that the county court judge had gone wrong in law by really disregarding the principle, which he accepted, and which is laid down in the Act, that it is for the plaintiff F to prove that the house has been decontrolled, pursuant to the provisions of sect. 7 (1) of the Act of 1938, which provides as follows:

> If any question arises in any proceedings whether the principal Acts apply to a dwelling-house, it shall be deemed to be a dwelling-house to which those Acts apply unless the contrary is shown.

Under sect. 2 of the Act of 1923, it was necessary, on the facts of this case, G for proof to be given that, on the death of the widow, the landlord had obtained actual possession. It being conceded, as the county court judge found, that the landlord never had possession, either actual or notional, *prima facie* the plaintiff was out of court, and, in my opinion, the county court judge ought to have given effect logically to the sub- H mission on behalf of the defendant that the predecessor in title of the plaintiff had never come into possession at all. He finds that that is correct, and that it was not disputed by the landlord. In my view, that is enough to make it necessary to allow this appeal. We have had an interesting argument on what constitutes actual possession by the landlord when a statutory tenant dies, but it is not necessary to go into that question for the decision of this case, and I do not propose to do so. The appeal must be allowed with costs.

MACKINNON, L.J.: I agree. There is no dispute that this
A house was what may be called a controlled house up to the end of 1928. It would continue in that category unless it were proved that it had been taken out of it. The burden of proving that it had been taken out of it was one cast upon the plaintiff, the landlord, under the relevant section of the Act of 1938. The landlord not only did not prove that
B it had been taken out of that category, because he had come into posession of the premises, but he admitted, as the county court judge records, that his predecessor in title "had never come into possession of the whole of the dwelling-house within sect. 2 (1) of the Act of 1923." That was conceded. That being so, the obvious result is that the plaintiff
C failed to adduce any evidence and discharge the onus of showing that the house had become decontrolled and remained a decontrolled house. Therefore, he was charging too much rent, and the claim to refund it must be successful. That seems to me to be the whole of the case. That being so, I think that the county court judge was definitely wrong
D when he decided that the house was decontrolled and that the plaintiff could succeed. I agree that the appeal succeeds.

DU PARCQ, L.J.: I agree, and I wish to add a few words with reference to the very ingenious argument which was put before us by
E counsel for the respondent. First of all, I should like to say this—and I think from some observations which have been made by SCOTT and MACKINNON, L.JJ., in the course of the case that they agree with me about it—that this is a most unfortunate way to try proceedings of this kind. In a case of this sort—at any rate, in the great majority of cases—
F it is most desirable that evidence should be heard. It is not satisfactory in a county court, where it is a question of drawing inference from facts, and looking sometimes rather closely at the facts, that statements and admissions should be made and the case heard, as counsel for therespondent has said, as if on a case stated. I do not know that the result
G would have been any different in this case if another course had been adopted—I doubt whether it would—but, at the same time, I should suggest to county court judges that it is usually desirable to hear evidence upon which to base findings of fact, and that it is not desirable to base the findings of fact upon the opening statement by counsel, even if the
H other side agrees with it.

I agree that, in the circumstances, it is quite impossible to take any course other than to allow this appeal. I am inclined to think, as I say, that even if the case had taken another course in the county court, and evidence had been heard, the result would have been the same. The landlord undoubtedly had the burden, in the circumstances of the case (having reached a position where that burden was placed upon him), of proving that the premises had been decontrolled. In order to do that, it was necessary for him to show that he was in possession of the dwelling-house, or had come into possession of it. To make an admission that one never came into possession of the dwelling-house is a very strange way of proving that one has come into possession of it.

However, counsel for the respondent, whose advocacy no one can say is not courageous, is not defeated by that. He says that, if one looks at the whole of the agreed facts, it will be apparent that the landlord's predecessor in title came into possession of the premises without knowing it, and, although he did not realise it, was really in actual possession. Counsel for the respondent reaches that conclusion by first of all relying on *Goudge* v. *Broughton* (1). Having had the opportunity now of looking more closely at that case, I should like to say a word or two about it. It is used by counsel for the respondent to support this argument: "When a statutory tenant dies, before a new tenancy can begin, there must be a lapse of time." It may be a fraction of a second, it may be some hours, or it may be some days, but there must be a lapse of time. Though somebody else may become tenant, and though there may be no moment of time in respect of which the landlord does not receive rent, either from the deceased tenant or from the representatives of the deceased tenant or from the new tenant, still, notionally there is a moment when the old tenant was dead and the new tenant had not come into possession as a new tenant, and, therefore, the landlord must have been in possession. That may be right so far as notional possession goes. However, there is authority for the proposition that, in such a case as that, if there are a few hours during which the new tenant is only there in the capacity of a licensee, during that time the landlord is rightly in actual possession." *Goudge* v. *Broughton* (1) is said to be an authority for that. I venture to think, however, that, when *Goudge* v. *Broughton* (1) is looked at, it is not an authority for anything of the kind. The facts in *Goudge* v. *Broughton* (1) were these. The plaintiff in that case bought a cottage in 1925. The cottage had never been let. The new purchaser, of course, was in possession of that cottage, unless it could be said that somebody else was in possession of it, so as to exclude him. If a man buys an empty house, though he never goes inside it, he is in possession. He is in actual possession of it. Nobody else can be. If there is a tramp sleeping in it without his permission, the new owner is still in possession of it. If there is somebody there whom he allows to be there, not as a tenant, but merely as a licensee, still it may be said that there are facts on which it can reasonably be found that the new owner is in possession of it. The difficulty of the plaintiff in *Goudge* v. *Broughton* (1) was not so much on that point as on quite a different point, where the Divisional Court was bound to decide against him because of a previous decision. It had been said: "It is quite true that you were the owner, and it may be true, and probably is true, that you were in possession, but you were not the landlord, because nobody can be the landlord of a house which has not been let, and it has not been let by you." That argument had appealed to the Divisional Court in *Cohen* v. *Gold* (2), and the Divisional Court in *Goudge* v. *Broughton* (1) was bound to follow *Cohen* v. *Gold* (2). The Court of Appeal, when the case came before it, said that *Cohen* v. *Gold* (2) was wrongly decided, and SCRUTTON, L.J., went on to say, at p. 130 :

> Holding this, [that *Cohen* v. *Gold* (2) applied] the court did not decide the point about the gardener, though I think the judgment of SALTER, J., shows he would either have held Goudge to have possession through the gardener, or the finding of the county court judge to be one of fact with which he could not interfere. I take the same view of this point. I think there was evidence on which the judge could find that the owner was in actual possession through the tenant at will or licensee.

All that SCRUTTON, L.J., decided, therefore—and GREER, L.J., and the other member of the court agreed—was that, where a man who must now be held to be the landlord had been in possession of a house, and there was nothing to show that he was not in possession except that he allowed a gardener to live in it, not as a tenant at all, but just as a tenant at will, then he could be said to have not only possession, but actual possession. That seems to me to be a very long way from saying that, where for some very short period after the death of the tenant the new tenant has not already entered upon her tenancy, but is negotiating, perhaps for a few minutes on the doorstep with the rent collector, she must be taken to be a licensee (which may be right), and that during that period the landlord must be regarded as having actual possession. I venture to doubt whether SCRUTTON, L.J., would have thought that, if there had been a finding to that effect by the county court judge, it could be supported by evidence as a finding of fact.

The other case on which counsel for the respondent relied was *Kearns* v. *Bedford* (3). He relied on that for the purpose of showing that, there being, as he says, a hiatus between the tenancies, it is not really material to see that the rent was paid continuously and that the whole period was covered by payment of rent. I still think that, where one has a case where the statutory tenant dies, the statutory tenant having died on the Friday and the rent having been paid to the Saturday, possibly without any statement on whose behalf it is being paid, and then as from Saturday one finds a new tenant installed and paying rent with the consent of the landlord, it is quite impossible to say that the landlord has been in actual possession. For myself, I have no doubt about that. It is unnecessary to say whether there has then been a change of tenancy with the landlord's consent. It is unnecessary, as the county court judge says, to decide that, though I should think that it is probably right to say that there was. It is unnecessary to decide it because I think that it is plain that the landlord, in such circumstances, has not come into actual possession. Counsel for the respondent answers that by referring to *Kearns* v. *Bedford* (3), but it is necessary to say only this about *Kearns* v. *Bedford* (3). That was a case in which, by general consent, the landlord had come into

actual possession. He had been in actual possession quite a long time,
but it was argued (and it was a bold argument, I should have thought)
that, because when the new tenant got his tenancy it was undated, and
was made to begin on Jan. 1, or whatever the date was, therefore he must
be deemed to have been in possession when in fact he was not, and that
the landlord must be deemed to be out of possession when in fact he was A
in possession. That, however, was rightly rejected by the court, because
possession is a question of fact. If one is once in actual possession,
nothing can happen to show that one has not been in actual possession.

I thought it desirable to make these observations on these cases
because, if we passed over in silence the argument of counsel for the respondent, B
it might be thought in some county courts that this court had
approved of the inference which we were asked to draw from that argument.
I agree that this appeal should be allowed.

Appeal allowed with costs in both courts.

Solicitors: *Barnett Janner* (for the appellant); *Bristows, Cooke &* C
Carpmael (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

D

FRANKLIN *v.* BRISTOL TRAMWAYS & CARRIAGE CO., LTD.

[Court of Appeal (Scott, MacKinnon and Luxmoore, L.JJ.), **October 17, 18, 1940**].

Negligence—Highways—Collision during blackout—Duty of pedestrian to look E
behind—Bus using sidelights placed too high and no headlights—Bicycle
not provided with red rear lamp.

On September 10, 1939, on a very dark night, and after the blackout
regulations had come into force, the plaintiff's husband was walking
along a road 30 feet wide wheeling a bicycle. The back mudguard
of the bicycle was painted white and a reflector disc had been fitted, F
but the bicycle was not provided with a red rear light as required by
the regulations then in force. Two buses were coming down the same
road some distance apart. Both buses were using only their sidelights,
although the use of headlights, subject to their being fitted with a mask,
was allowed by the regulations. The sidelights of the first bus were
fitted on the front mudguards, but those of the second bus were fitted
at a higher level, some 8 feet or 9 feet from the ground. When the driver G
of the first bus was overtaking the plaintiff's husband, he saw him at
the last moment, and by a violent swerve to the off side of the road
managed to avoid him. It appeared that at that moment the deceased
was crossing the road. The driver of the second bus failed to see him,
ran into him from behind, and injured him fatally. The widow brought
this action against the owners of the second bus in respect of her husband's
death, alleging negligence in the driving of the bus, and by way H
of defence the bus company pleaded the contributory negligence of
the deceased:—

Held: in blackout conditions, a new duty is imposed on a person
walking in the road by reason of the difficulty which the driver of a vehicle
has of seeing a person or thing not illuminated by a light, and, in these
circumstances, it is the duty of such a person to take all reasonable steps
to minimise the difficulty of overtaking traffic. The defendants were

negligent in having the sidelights of their bus so high that they failed to illuminate the road, and in not having them supplemented by a masked headlight, which was permissible, but the deceased, by his negligence, contributed to the accident, in that he failed to keep a lookout for overtaking traffic. The deceased was also guilty of a breach of statutory duty in failing to provide his bicycle with a red rear light.

[**EDITORIAL NOTE.** The blackout has increased the difficulties of persons using the road after dark, whether on foot or driving vehicles. It has always been a principle of the common law that the pedestrian has a duty to use the road with care, and that the responsibility for avoiding accident does not rest solely on the drivers of vehicles. In recent times, fast-travelling vehicles have carried such lights as would enable them to see obstacles in the road at a sufficient distance to avoid accidents. The imposition of the blackout has forced them to dim and screen these lights, and the lights now allowed in places where there is immediate danger of enemy action are insufficient to light the road. Thus they cease to be a means of indicating objects on the highway, and become merely a means of indicating the presence and position of the vehicle. The decision here is that, in these circumstances, a person walking in the road is now under a duty during the blackout to keep a look-out for vehicles, more particularly those overtaking him, and, being made aware of their presence by their dimmed lights, to take every precaution to avoid collision with the vehicles. It is said that this duty is higher because it is practically impossible for the driver to see the pedestrian, whereas the lights make the presence of the vehicle easily ascertainable provided that the pedestrian keeps a proper look-out.

As to Negligence on Highways, see HALSBURY, Hailsham Edn., Vol. 23, pp. 637-644, paras. 894-906; and for Cases, see DIGEST, Vol. 36, pp. 59-66, Nos. 366-428.]

Appeal by the plaintiff from a judgment of Hawke, J., without a jury, dated July 3, 1940, and delivered at Bristol. The facts are fully set out in the judgment of Scott, L.J.

The Road Transport Lighting Act, 1927, s. 1 (1), provides as follows:

> Subject to the provisions of this Act and of any regulations made thereunder by the Minister of Transport (in this Act referred to as "the Minister"), every vehicle on any road shall during the hours of darkness carry (*a*) two lamps, each showing to the front a white light visible from a reasonable distance; (*b*) one lamp showing to the rear a red light visible from a reasonable distance; and every such lamp shall, while the vehicle is on any road during such hours as aforesaid, be kept properly trimmed, lighted, and in efficient condition, and shall be attached to the vehicle in such position and manner as the Minister may by regulations prescribe.
>
> It shall be the duty of any person who causes or permits a vehicle to be on any road during the hours of darkness to provide the vehicle with lamps in accordance with the requirements of this Act and of any regulations made thereunder.

The relevant regulations in force at the time of the accident were the Lighting (Restrictions) Order, 1939, but these were subsequently replaced by the Lighting (Restrictions) Order, 1940. The order of 1939 required sidelamps to be dimmed and the area of the aperture to be reduced. It permitted a headlamp of limited power properly masked, and required bicycles to be provided with a red light at the rear.

F. S. Laskey for the appellant.

Humfrey H. Edmunds for the respondents.

Laskey: Although the bicycle had no red rear light, it had a reflector and a white rear mudguard, which would have caused it to be seen if the lights on the bus had been in their proper position. It is clear on the facts that the deceased was run into from behind, and, therefore, if there had been proper lights on the bus, he should have been seen. The fact that the driver of the first bus saw the deceased and avoided him is conclusive evidence that it was possible for the defendant's driver to have avoided him.

Edmunds: For the purposes of this case, the fact that the lights on the bus were not in the best position is immaterial. When lighting is restricted, owing to a blackout being ordered, there is a duty upon a person walking in the road to look from time to time to see what traffic is overtaking him. The lights on the bus are not there for the purpose of lighting the road so that the driver may see objects with which he might collide, but are there for the purpose of indicating to other users of the road the presence and the exact position of the bus. There is, therefore, a duty upon persons walking in the road to keep a proper lookout for the lights of overtaking traffic. A person walking in the road is far better able to move to one side for the purpose of avoiding an accident than is a heavy bus.

Scott, L.J.: In this case, the court feels bound to dismiss the appeal. The action was a claim by a widow for damages for the death of her husband, which took place when he was walking on the highroad close to Swindon during the blackout period in Sept., 1939, on a very dark night. He was walking in the direction of Swindon in a general sense, but the circumstances were rather exceptional. He was wheeling a bicycle a week after a statutory regulation had been made compelling persons, whether riding or wheeling a bicycle, to carry on it a red rear light. The accident took place towards the foot of a slope from north to south towards Swindon. The deceased man had been on his off side of the road for some unknown purpose, and he was engaged in crossing the road when a Swindon Corporation bus came down from the north. The driver of the bus saw him when the bus was almost on him, and, by making a violent swerve to his off side and crossing the white line in the middle of the road, which was 30 feet wide, was just able to avoid him. In fact, he avoided him by a short distance. Another bus, belonging to the defendants, was coming down some way behind the first. There was a dispute in the court below as to the distance behind the first bus at which the other was coming, but it is clear that the distance was considerable. Nothing is known directly as to what the deceased man did with his bicycle after the corporation bus had succeeded in avoiding him. Presumably the deceased pursued his way across to his proper side still wheeling it. He had no rear light in accordance with the regulation, but he had a reflector disc and his mudguard was painted white. The driver of the defendants' bus came down the hill, did not see the man at all, and ran into him, knocked him down, and hit his bicycle from behind, damaging it, catching it up,

and carrying it about a bus length before the bus stopped. As it proved,
the man himself was hurt fatally. He was hit on the body and thrown
on to the road, his head being some 2 feet from the grass verge at the
edge of the road and his feet projecting across the road. Those are the
only facts which are known directly as to the collision.

A Two people, one of whom gave evidence, were on the footpath on
the west side of the road, and happened to be more or less opposite to
the place where the swerve by which the corporation bus avoided the
deceased man took place. The witness who gave evidence said that,
after the swerve had taken place, he himself, not knowing why the bus
B had swerved, not having seen the man on his bicycle, and thinking, at
the time when the swerve began that the bus was going to run into them
on the footpath, turned and watched the corporation bus pursuing its
road southward towards Swindon, and then turned suddenly in the other
direction and saw what he thought were three lights some 30 yards or
C 40 yards away. It proved to be the defendants' bus carrying in fact
two side lights, which were placed high up on the bus, and were not low
enough to throw much light on the roadway. That may partly explain
why the driver did not see the deceased man or his bicycle at all. The
bus ran into the deceased, and the driver knew nothing except shock. He
D pulled up, and then the deceased was found. Those are all the relevant
facts, except the fact, which is said to relevant, though perhaps it is not,
that the deceased man had tried to get a red rear light and had failed to
do so.

In those circumstances, the case was tried by HAWKE, J., who held,
E on grounds into which we need not go, that the deceased man had been
guilty of contributory negligence, and that, therefore, his widow could
not recover. The appeal was brought to this court mainly on the ground
that the judge had thought that the defendants' bus was following closely
behind the corporation bus, and it was argued—I think successfully—
F that the evidence showed that there was a very considerable distance
between the two, and that the case had to be considered apart from the
movements of the corporation bus, as if only the man in the road with
his bicycle was relevant to the collision. It was said that, if there was
a great distance, there was ample opportunity for the driver of the
G defendant's bus to see the man and his bicycle in time to avoid a collision,
just as the corporation bus had succeeded in doing.

At first we felt that the difference of inference as to the true facts drawn
by this court and that drawn by HAWKE, J., at the trial was important,
but counsel for the respondents stated a ground for holding the judgment
H in this court which was not referred to in the judge's judgment, and,
whether or not he had put it forward in the court below, he was entitled
to rely upon that ground here in order to hold his judgment. He put
forward the argument that, in the blackout during the war, and under
the stringent conditions limiting lights, the position of a pedestrian in the
road is quite different—particularly if he is wheeling a bicycle, and quite

apart from the regulation compelling the carrying on the bicycle of a red rear light—from what it is in times of peace, when motors have full headlights and when the conditions of difficulty caused by the blackout do not exist. In blackout conditions, there is imposed on a person in the road the new duty of bearing in mind the difficulty which the driver of an oncoming vehicle will have, of seeing a person or a vehicle bearing no light and of realising that it is his duty as a person in the road to take all reasonable steps to minimise such difficulty. That broad argument appeals to me as being well-founded and reasonable, and, if, through the absence of some precaution or through the failure to take some step which could be taken, the difficulty of the driver of the oncoming vehicle is increased, in my view, it cannot be said that that breach of duty or failure to take reasonable care does not contribute causally to the accident.

In this case, I think that undoubtedly the defendants were to blame, on the ground, first, that the sidelights were so high that they did not serve to illumine the road and were not supplemented by the masked headlight which was permissible and made it wrong to leave the sidelights placed so high on the vehicle, and, secondly, that, even in those difficult circumstances, the driver did not keep as good a lookout as he might have done. However, even assuming that negligence, which I think is established, it does seem to me that, in the circumstances, it is impossible to exonerate the deceased man from want of care, after he had nearly been run into by the one bus, in failing to look round and see what was coming after he got on to his proper side of the road. Moreover, if, through failure to look round, he omitted to step off the road, as he would obviously have been entitled to do, and so avoid the accident, and remained on the road in a position of critical danger, it cannot be said that he did not contribute to the accident. Therefore, I conclude that, even apart from the question of a breach of statutory duty, he was guilty of common law contributory negligence which causally contributed to the accident. The case is obviously made stronger by the fact that he had not yet equipped his bicycle with a rear light.

There was a question in the case as to whether he was carrying a headlight at all on the bicycle, but it is not necessary to form a final opinion on that, because what I have said deals with the question of law. From the evidence, my own impression is that he was not carrying a light of any kind on his bicycle, but it is unnecessary to decide that. For these reasons, in my view, the appeal must be dismissed with costs.

MacKinnon, L.J.: I agree.

Luxmoore, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Lemon, Humphreys & Parker*, Swindon (for the appellant); *Stanley & Co.* (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

Re DIPLOCK, WINTLE *v.* DIPLOCK.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **January 13, 14, 15, 1941.**]

Charities—Charitable purposes—Such charitable institution or institutions or other charitable or benevolent object or objects—"Or benevolent"—Validity.

The testator by his will gave £5,000 each to his executors, certain private legacies, certain sums to named charities, and the residue of his estate on trust "for such charitable institution or institutions or other charitable or benevolent object or objects as his executors might in their absolute discretion select. After the estate had been wound up and the residue distributed to numerous charities, those entitled on an intestacy claimed that the residuary gift was not a good charitable bequest. It was contended on their behalf that the words "or benevolent" might embrace objects not strictly charitable, and that this bequest was, therefore, void for uncertainty and failed :—

HELD : the words "charitable or benevolent object or objects" had to be construed in their natural sense, unless there was something in the will, read as a whole, which imposed a different meaning upon them. In the present case, there was nothing in the will which required any different meaning to be placed on those words and the residuary gift was void for uncertainty and failed.

[**EDITORIAL NOTE.**—In the court below it was held that the will, read as a whole, showed such a clear intention to benefit charitable objects only that the word "benevolent" had to be construed as synonymous with charitable. The Court of Appeal have been unable to find any such context in the will and have felt themselves bound by authority to hold that the gift failed. The authorities on the point are certainly very strongly in favour of this decision, but, in a vigorous and characteristic judgment, GODDARD, L.J., has shown strong reasons for supposing that the decision of FARWELL, J., in the court below gave effect to the intention of the testator, while that of the Court of Appeal most probably inures to the benefit of persons of whose existence the testator had forgotten or was even quite ignorant. The matter will, it seems, be taken to the House of Lords. The question would seem to be whether the rule of construction which the authorities state with regard to the words in question operates to give effect to the real intention of a testator. On the other hand, it has to be remembered that rules of construction which have been settled and acted on for a long series of years and upon which deeds and instruments giving property rights have been based are not to be lightly set aside for the reason that they sometimes operate harshly or fail to give effect to the intention of a settlor or testator.

AS TO ALTERNATIVE CHARITABLE OR OTHER PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 167-169, para. 221 ; and FOR CASES, see DIGEST, Vol. 8, pp. 294-297, Nos. 719-740.]

Cases referred to :

(1) *Morice* v. *Durham (Bp.)* (1805), 10 Ves. 522 ; 8 Digest 293, *705* ; *on appeal from* 9 Ves. 399.

(2) *Re Macduff, Macduff* v. *Macduff,* [1896] 2 Ch. 451 ; 8 Digest 296, *731* ; 65 L.J. Ch. 700 ; 74 L.T. 706.

(3) *Bowman* v. *Secular Society, Ltd.,* [1917] A.C. 406 ; 8 Digest 265, *270* ; 86 L.J. Ch. 568 ; 117 L.T. 161.

(4) *A.-G. for New Zealand* v. *Brown,* [1917] A.C. 393 ; 8 Digest 298, *748* ; 86 L.J.P.C. 132 ; 116 L.T. 624.

(5) *James* v. *Allen* (1817), 3 Mer. 17 ; 8 Digest 293, *708.*

(6) *Re Ludlow, Bence-Jones* v. *A.-G.* (1923), 93 L.J.Ch. 30 ; Digest Supp.

(7) *Re Horrocks, Taylor* v. *Kershaw*, [1939] P. 198 ; [1939] 1 All E.R. 579 ; Digest Supp. ; 108 L.J.P.86 ; 160 L.T. 324.

(8) *Ellis* v. *Selby* (1836) 1 My. & Cr. 286 ; 8 Digest 295, *726* ; 5 L.J. Ch. 214.

(9) *Re Jarman's Estate, Leavers* v. *Clayton* (1878), 8 Ch.D. 584 ; 8 Digest 295, *727* ; 47 L.J.Ch. 675 ; 39 L.T. 89.

(10) *Williams* v. *Williams, Williams* v. *Kershaw* (1835), 5 Cl. & Fin. 111, n. ; 8 Digest 297, *747* ; 5 L.J. Ch. 84. A

(11) *Hunter* v. *A.—G.*, [1899] A.C. 309 ; 8 Digest 291, *687* ; 68 L.J. Ch. 449 ; 80 L.T. 732 ; *revsg.* S.C. *sub nom Re Hunter, Hood* v. *A.-G.*, [1897] 2 Ch. 105.

(12) *Von Brockdorff* v. *Malcolm* (1885), 30 Ch.D. 172 ; 44 Digest 562, *3798* ; 55 L.J. Ch. 121 ; 53 L.T. 263.

(13) *Re Douglas, Obert* v. *Barrow* (1887), 35 Ch.D. 472 ; 8 Digest 298, *754* ; 56 L.J. Ch. 913 ; 56 L.T. 786. B

APPEAL by the persons entitled on an intestacy from the decision of FARWELL, J., reported [1940] 3 All E.R. 538, where the facts are fully stated.

Hon. C. R. R. Romer, K.C., and *C. L. Fawell* for the appellants, the persons entitled on an intestacy. C

J. Leonard Stone for the trustees.

C. E. Harman, K.C., and *H. H. King* (for *W. S. Wigglesworth* on war service) for the charities.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *A. Andrewes Uthwatt* for the Attorney-General. D

Romer, K.C. : It is a cardinal principle of construction that, if the court can, it will give some significance to all the language which is contained in the will. In the present case, that canon of construction has been disregarded, and words which are capable of being given an obvious meaning have been struck out. E There can be no reason in the present case for striking out words. The testator says that he desires to benefit charitable or benevolent objects. One knows what he means. The effect of striking out the words " or benevolent " is to cut down the scope of the bequest. One of the best-established rules of construction is that F effect is to be given to all the words of a will, if it be possible. It is almost impossible to say in the present case that the executors have no power under the terms of the will to give a sum to an object unless it is charitable in the strict legal sense. The court will not control a trust for objects which are philanthropic or benevolent. In *Morice* v. *Durham* (*Bp.*) (1), G it was held that a bequest for objects of benevolence and liberality could not be supported as a charitable legacy. In *James* v. *Allen* (5), a bequest in trust for such charitable purposes as the trustees agreed upon was held void, on the ground that the word " benevolent " could not be restricted to the sense of " charitable." In *Ellis* v. *Selby* (8), the words H were " charitable or other purposes." It was held that these words made the trust of so indefinite a nature that the trust could not be carried into effect, and that the fund fell into residue. In *Re Jarman's Estate, Leavers* v. *Clayton* (9), the words " charitable or benevolent " had been used in the will. It was said that the will should be looked at as at the date of the death of the testator to see whether the gift was definite or indefinite. In that case, the gift was held to be indefinite, and it was held that it failed. In *Re Macduff, Macduff* v. *Macduff* (2), a sum of money was left for philanthropic purposes, and the bequest was held to be void, on the ground that there might be good philanthropic purposes which were not charitable. In *A.-G. for New Zealand* v. *Brown* (4), the words were "charitable and benevolent," and the gift accordingly failed for uncertainty. In *Re Horrocks, Taylor* v. *Kershaw* (7), the court refused to alter a will by omitting the word "or" so that the words would then read "charitable benevolent." It was held that to omit the word "or" would be to defeat the intention of the testator, and that there was no jurisdiction to make the alteration. If one takes cl. 6 of the will in the present case by itself, the residuary disposition is bad, because the executors are authorised to distribute the assets amongst objects some of which may not be charitable in the legal sense. The question is not whether the executors may distribute the fund among objects which are charitable. It is whether or not they are bound to do so. The fact that the fund has already been distributed amongst charities is irrelevant. By cl. 5 of the will, the testator intended to benefit certain specified charities, and he did so. It is impossible to say that cl. 5 has any bearing upon the matter. A gift couched in the language of this will is invalid according to the law of this country.

[Counsel referred to *Williams* v. *Kershaw* (10), *Hunter* v. *A.-G.* (11) and *Bowman* v. *Secular Society, Ltd.*, (3)].

Harman, K.C.: The law is able to effect what the testator has expressed to be his intention. The intention must be expressed in the will. If the solicitors have blundered and inserted the word "or", it should not be supposed that the testator intended to alter the scope of his will. The legal meaning of the word "charitable" is wider than the popular meaning. For instance, it would include a fund to open Joanna Southcott's Box. That would not be considered a charitable object in the popular sense of the word. The testator in the present case did not intend, by using the words he has used, to widen the scope of his bounty. If the will is to be made to depend upon the difference between "or" and "and" it will be observed that the testator used "or" in the second case. FARWELL, J., was justified in saying that the testator had an overriding intention of benefiting charity and nothing else. It cannot be suggested that, by using "or" instead of "and" he intended to die intestate. The word "benevolent" is also used in its popular meaning of relief of poverty. On a number of occasions, the court has said that the word "benevolence" means goodwill towards everybody. In the popular sense, the word means the relief of poverty and distress. The question is as to what must be taken to have been the testator's intention when he signed his will, on the true construction of that will. It is always a matter of speculation to some extent. If cl. 5 is regarded together with cl. 6, one receives the impression that there is an overriding intention to benefit charity. If that view is not taken, the testator must be taken as not having intended to dispose of his estate. If it is supposed that he did not intend to give his property to charity, it must be supposed that he intended his will to be ineffectual. A man does not intend that. The word "charitable" was used by the testator in its popular sense, **A** and the popular sense is within the legal sense of the word. Clause 7 strengthens that view because of the words "given or applied" which are to be found there. In cl. 7, the testator speaks of hospitals, homes or other institutions. These cannot be said to be outside the orbit of charity. There is no better rule than that the court should give a benig- **B** nant construction in favour of charity. If the court thinks that the words are ambiguous and that the one meaning will effect the document while the other meaning will not, the first meaning should be chosen. If possible a will should be construed *ut res magis valeat quam pereat*: *Von Brockdorff* v. *Malcolm* (12). **C** In the present case, notwithstanding the presence of the word "or", the word "benevolent" should be construed *ejusdem generis* with the word "charitable." The word "or" could be struck out, or it could be changed to "and" or to "*id est*." Testators have not the knowledge of the law which they are presumed to have. When the ordinary man uses the word "benevolent", he does not mean "philan- **D** thropic." The word "charitable" is a term of art, and the word "benevolent" is not so. No one outside the courts would describe the opening of Joanna Southcott's Box as a charitable object. The cases cited on behalf of the appellants do not constrain the court to come to a conclusion different from that to which Farwell, J., came. *Morice* **E** v. *Durham* (*Bp.*) (1) was decided upon the meaning of the word "liberality," although the word "benevolent" also appears. In *Re Ludlow, Bence-Jones* v. *A.-G.* (6), it was held that the words "benevolent institution" were subsidiary to the main bequest. In the will in the present case, the word "benevolent" can be confined to objects which **F** are charitable. The testator did not intend by the use of the word "benevolent" to extend the meaning of the word "charitable." Therefore, the clause is not bad. [Counsel referred to *James* v. *Allen* (5), *A.-G. for New Zealand* v. *Brown* (4), *Hunter* v. *A.-G.* (11), *Re Douglas, Obert* v. *Barrow* (13) and *Ellis* v. *Selby* (8).] **G**

Attorney-General: The decision in *Ludlow's* case (6) was as nearly decisive as any authority can be when another will in similar terms is before the court. In that case, the words are "or any other charitable or benevolent institution." The ambit within which the argument moved in that case was similar to that of the present case. The principle **H** deducible from *Ludlow's* case (6) is applicable to the present case. In *A.-G. for New Zealand* v. *Brown* (4), Lord Buckmaster would have taken the course which was taken in *Ludlow's* case (6) if it had not been for the investment clause. In a proper case the word "benevolent" can be covered by the mantle of charity. One of the curious features

of the present case is that, while the testator left his money for charitable purposes generally, he had not the slightest idea that the word "charitable" includes provision for the cultivation of horticulture and the provision of playing-grounds for schools. The word "charitable" is construed by the courts as including many objects which would not be
A regarded as charitable by the ordinary person. The court must reconsider the meaning of the word "benevolent" as laid down in the cases, having regard to the extension of meaning which has been given to it. In the time of LORD ELDON, the word "charitable" had a narrower meaning than it has to-day. In ordinary conversation, the word "benevolent"
B may be used without any reference to the spending of money. The overriding intention of the testator in the present case was that his money should be applied to purposes which were for the good of the community. That intention should not be defeated because he has used the word "benevolent" in a subsidiary part of his will. The word "overriding"
C is used in *Ludlow's* case (6). The court may look at the will as a whole. There is a clear intention in the present case to benefit charities, and that is relevant in considering whether or not the word "benevolent" is to be construed as being within the wide scope of charity. [Counsel referred to *Re Macduff, Macduff* v. *Macduff* (2), *James* v. *Allen* (5) and *Williams*
D v. *Kershaw* (10).]

Romer, K.C., in reply: Counsel for the charities said that the fund had been distributed by the executors to various charitable bodies and that some of them might have spent the money which they had received in re-building. It is unfortunate that the executors did not seek the
E opinion of the court before distributing the fund. That, however, must be quite an irrelevant topic when one considers a question of construction. The position is the same as it would be if the fund were still in the hands of the executors and they were seeking the opinion of the court. As the present case has proceeded, it has become increasingly
F clear that the gift in question is invalid. The point has been before the court many times. In *Bowman* v. *Secular Society, Ltd.* (3), it was pointed out by LORD PARKER OF WADDINGTON that a gift for charitable or benevolent purposes is void. With regard to the argument that in the the present case there is a general overriding intention, contained in
G the will, to benefit charity, there cannot be a general charitable intention if it is coupled with something which is not necessarily charitable. It is quite impossible to say that the words of cl. 5 of the will give rise to a general charitable intention. In the will in the present case, there is neither a general overriding intention nor an ambiguity. As regards
H the argument that the word "benevolent" means the same thing as the word "charitable," the general presumption is that, when a testator uses the words "or benevolent," he means something which is alternative to "charitable." If the words "or benevolent" add nothing to the word "charitable," it is curious that the words are not found in relation to institutions. The testator used the words in connection with object or

objects, but not in relation to institution or institutions. It has been suggested that the words "or benevolent" in regard to object or objects have got in by mistake. It is equally likely that the words were left out by mistake in regard to institution or institutions. In *A.-G. for New Zealand* v. *Brown* (4), the main question was whether or not "and" should be read as "or." [Counsel referred to *Re Ludlow, Bence-Jones* v. A
A.-G. (6) and Hawkins on Wills, 3rd Edn., prop. 1.]

Sir Wilfrid Greene, M.R.: Two matters fall to be considered in this appeal—namely, the true construction of the relevant parts of the testator's will and the legal principles which ought to be applied to B
the will as so construed. Those principles are not in doubt. I propose to refer to three passages only out of the many authorities which have been cited to us. The first is to be found in the words of Sir William Grant in *Morice* v. *Durham* (*Bp.*) (1), at p. 406:

> The question is not whether he [the trustee] may not apply it upon purposes strictly C
> charitable, but whether he is bound so to apply it.

The next is to be found in the words of Lord Eldon in the same case, at p. 542:

> But the true question is, whether, if upon the one hand he might have devoted the whole to purposes, in this sense charitable, he might not equally, according to the intention, have devoted the whole to purposes benevolent and liberal and yet not D
> within the meaning of charitable purposes, as this court construes those words; and, if according to the intention it was competent to him to do so, I do not apprehend that under any authority upon such words, the court could have charged him with mal-administration, if he had applied the whole to purposes which, according to the meaning of the testator, are benevolent and liberal: though not acts of that species of benevolence and liberality which this court, in the construction of a will, calls charitable acts. E

That passage was referred to by Lindley, L.J., in this court in *Re Macduff, Macduff* v. *Macduff* (2), at p. 465:

> I take it that that principle is as sound as it was when Lord Eldon announced it—he did not announce it for the first time.

The third citation is from the opinion of Lord Parker of Waddington F
in the House of Lords in *Bowman* v. *Secular Society, Ltd.* (3), at p. 441:

> A trust to be valid must be for the benefit of individuals, which this is certainly not, or must be in that class of gifts for the benefit of the public which the courts in this country recognise as charitable in the legal as opposed to the popular sense of that term. Moreover, if a trustee is given a discretion to apply trust property for purposes, some of which are and some are not charitable, the trust is void for uncertainty. G

Those principles, I apprehend, are really nothing more than the application of a fundamental principle of the law relating to trusts. In order that a trust may be properly constituted, there must be a beneficiary. The beneficiary must be ascertained or must be ascertainable. In the case of what I may call impersonal trusts, such as a gift for charitable H
purposes or benevolent purposes, there is no class of beneficiary which can be defined in the same sense as a class of beneficiaries such as a class of relatives. In the latter case, although no particular person in the class may be able to say that at any given moment he is entitled to anything out of the trust, the class as a whole can enforce the trust.

In the case of charitable trusts in which no defined class is specified, nevertheless, owing to the particular principles which have come to be applied to charitable gifts, the courts have not treated the trust as failing for that reason. There is a very good ground for that—namely, that the Crown, as *parens patriae*, taking all charities under its protection, is in a position to enforce the trust, and, therefore, although there may be no specified charitable beneficiary who can come to the court and insist on having the trust performed, nevertheless the Attorney-General can appear and is entitled to insist on the trust being carried out, if necessary, by a scheme *cy-près*. However, that exception to the general rule that there must be beneficiaries ascertained or ascertainable—if I may call it an exception—does not extend beyond what falls within the legal class of charity. It does not extend to other public-spirited purposes. Avoiding the word " benevolent " for the purpose of an illustration, I will take the word " philanthropic." The Crown has never assumed the right to come to the court and ask for the execution of a philanthropic trust. It has only assumed the right to come to the court and ask for the execution of a charitable trust, and, accordingly, if there is a gift for philanthropic purposes, it suffers from the vice of not having a beneficiary, ascertained or ascertainable, in whose interest the court can administer the trust. So much for the legal principles to be applied in deciding this appeal.

The matter now becomes a pure question of construction, and, in deciding that question of construction, it is perhaps unnecessary to say that the court must not allow its mind to be deflected by any consideration of the consequences of its decision. What has happened since the death of the testator is entirely immaterial for the purpose of the decision of this case. The construction of the will remains the same to-day as it was at the moment after the testator's death, and nothing which has happened can alter it, nor can it be allowed in any way to affect our minds. The rule of construction to be applied is, of course, the cardinal rule that words are to be construed in their natural and grammatical sense unless there is something in the context of the will, read as a whole, which imposes a different meaning upon them. In the present case, the testator, after giving legacies to individuals, gives certain charitable legacies in cl. 5, while in cl. 6 he gives the residue of his property to his executors, who are to apply it :

> . . . for such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executors or executor may, in their or his absolute discretion select and to be paid to or for such institutions and objects if more than one in such proportions as my exceutor or executors may think proper.

Then follows cl. 7, which only deals with the case of institutions, and in which the testator declares that :

> . . . the receipts of the treasurer or other proper officer for the time being of any hospital home or other institution shall be a sufficient discharge for any legacy bequeathed given or applied thereto.

Taking that language and reading it in its natural and grammatical meaning, I think that it is not open to doubt that the testator is giving his trustees an option to apply his residue either (i) to a charitable institution or institutions, (ii) to some other charitable object, or (iii) to some benevolent object or objects. The word " or " is *prima facie*, and in the absence of some restraining context, to be read as disjunctive, and, if a testator wishes to give his trustees a discretion to apply his property either to charitable or to benevolent objects, I do not myself know that A other word in the English language he can more suitably use than the word " or." I approach this question, therefore, on the view that the word " or " is *prima facie* to be read as meaning what it says. As one of the arguments which he put before us, counsel for the charities invited us to construe the word "or" as meaning "and," or as meaning "*id est*", B or, he said, it should be omitted altogether. I am quite unable to understand on what principle of construction, or, indeed, of common sense, it would be justifiable to apply such violence to the language of a testator. That words may be omitted, that they may even be changed in their meaning, or read in a meaning which is far from their natural meaning, C if the context so requires it, is, of course, a truism, but I can find no vestige of a context in this will which would justify the court in reading the word " or " in that way.

The next way in which counsel for the charities endeavoured to grapple with his difficulty related to the word " benevolent ". In the first place, D he said that the word " benevolent " nowadays, in its ordinary meaning to the man in the street, is confined to the relief of poverty or distress, which is of necessity a charitable object. The result of that argument, if it were accepted, would be that the testator would have used the word " charitable " and followed it, as an alternative, with an object E which was already included in the larger word which he had used. That by itself would not perhaps be surprising, if the construction of the words led to it. Counsel for the charities invited us to hold that the word " benevolent " had changed its meaning, and had come to have that meaning to-day. The Attorney-General, if I followed his argument correctly, F maintained that the word " benevolent " was now really co-extensive in meaning with the word " charitable," and he ingeniously suggested that that result had come about, not so much by a contraction of the meaning of the word " benevolent," as by an extension of the meaning of the word " charitable," so that the two now covered the same ground. G It may very well be that objects which in the old days would not have been regarded as charitable are now regarded by the courts as charitable, but, if that be the case, it is not due to any alteration in the legal meaning of the word " charitable." It is due to a different appreciation of social questions and matters of that kind. However, even allowing for that H argument, I am quite unable to accept either the proposition that the word " benevolent " means the same as the word " charitable " or the proposition that the word " benevolent " covers part of the ground which is covered by the word " charitable," and does not extend beyond it. In my opinion, the truth is that the word " benevolent " in some respects covers less ground than the word "charitable" and in other respects covers more. The suggestion that there is some new-fangled modern meaning for the word "benevolent" is, I think, entirely displaced by a reference to two recent authorities, both decided in 1917. The first is *A.-G. for New Zealand* v. *Brown* (4), where LORD BUCKMASTER, A delivering the judgment of the Privy Council, said, at pp. 395, 396:

> It is obvious that the real obstacle that lies in the appellant's path is due to the word "benevolent." In accordance with a well-established series of authorities, beginning at least as early as *James* v. *Allen* (5) a gift for benevolent purposes is bad, because such purposes go beyond the legal definition of charities—a word which, in the construction of wills, has always possessed a limited and technical meaning. It is far too late to question the soundness of these authorities at the present day.

B In the passage from *Bowman* v. *Secular Society, Ltd.* (3), part of which I read a moment ago, LORD PARKER OF WADDINGTON said, at p. 441:

> A simple instance of this is a gift for charitable or benevolent purposes. Such a gift is void, for benevolent purposes are, as is well settled, not necessarily charitable.

I therefore reach the conclusion that the word "benevolent" in its C ordinary grammatical meaning goes beyond the legal meaning of the word "charitable."

On that footing, the next argument which was put before us was that, even if that be so, there is to be found in this will a context sufficient to give to the word "benevolent" a different and more limited meaning. D I have searched this will and I have listened attentively to the arguments which have been put before us, and I am no nearer to finding such a context now than I was at the beginning. It was said that in this will there was a context consisting of what was described as an overriding charitable intention. I am afraid that I do not appreciate the force E of the word "overriding" in this connection. If it means exclusive, it begs the whole question which has to be answered. If it merely means that the testator was a very charitable person, and that charity was the first and principal thing about which he was thinking, it carries the argument no further. In order to have any force at all for present F purposes, a context which is sufficient to restrain and limit the natural meaning of the word "benevolent" must be found, and that context is not to be found in the fact that the testator has given charitable gifts, or in the fact that he has put his charitable gifts first, or in the fact, if fact it be, that he had a preference for charitable gifts. Those cir-G cumstances appear to me to be quite insufficient to justify taking the words used—and, we must assume, deliberately used—by the testator, the normal meaning of which is beyond doubt, and giving them some meaning quite different from that which they normally bear. I ask myself once again: if a testator, however great his preference for charity, H and however great a bias in favour of charity his mind may have, is minded to add to that an intention to benefit benevolent objects, by what language other than the language which this testator has used, is he to accomplish his purpose?

The argument was also based very largely upon *Re Ludlow, Bence-Jones* v. *A.-G.* (6), a decision of this court on appeal from P.O. LAWRENCE,

J. It must not for one moment be supposed from anything I have said that in a proper context the word "benevolent" may not be given a meaning much more limited than that which it normally bears. A proper context in a will can place very remarkable meanings upon ordinary words; but I find no real assistance in considering totally different language in the other wills referred to as showing how a context may A
alter the meaning of a word. That it can alter it is beyond doubt. Whether in any particular case it does alter it is a question on the construction of the particular language used, and I find very little assistance in looking at different language in different wills. However, as *Re Ludlow, Bence-Jones* v. *A.-G.* (6) was pressed upon us, I will make one B
or two short observations about it. The context there was of a character totally different from that of the context here. The gift was not a gift to institutions. It was not a gift to trustees to distribute among institutions of a specified character. It was a gift for a particular object—namely, putting it quite shortly, the setting up and endowment of hospital C
wards or beds. Such a purpose is unquestionably charitable, and both P. O. Lawrence, J., and this court held that the object for which the money was to be applied was a charitable object. The testator then went on to indicate the types of institution in which that charitable purpose could be effected by his trustees, and one of them was a bene- D
volent institution. Once it is held that the purpose is a charitable purpose —*e.g.* the endowment of a hospital ward or bed—the fact that some particular class of institution in which the testator contemplates that that purpose may be achieved does not happen to be an institution whose general objects are exclusively charitable cannot have any material E
significance. A charitable purpose is not made non-charitable by indicating that one of the places where it may be performed or achieved is within the four walls of a non-charitable institution. In that case, once it was decided that the purpose for which the money was to be spent was charitable, all difficulty, it seems to me, would have disappeared. F

There was one other authority relied upon, and that was *A.-G. for New Zealand* v. *Brown* (4). It was suggested that the word "benevolent" there was construed in the way in which it was construed only by reason of something in the investment clause. In my opinion, that is a misconception as to the reasoning of the Board. The passage in question, G
which I do not propose to read, was dealing with the argument that in a particular passage of the will the word "charitable" governed all the following adjectives. The phrase was:

> . . . such charitable benevolent religious and educational institutions societies associations and objects as the trustees shall select. H

The argument, as I say, was that the word "charitable" governed all of them. That argument was rejected, but that argument never could have been put forward for one moment if there had been the disjunctive word "or." If the gift had been for charitable or benevolent or religious or educational institutions, nobody could have said, as a matter of interpretation, that the word "charitable" governed the other words. It was only the absence of the word "or" which enabled that argument to be put forward at all. I get no assistance at all from the observations in that passage.

That really disposes of the whole matter. As I follow the judgment A of the judge in the court below, although he does not express in terms the precise construction which he puts upon the words, the conclusion to which he came appears to be that the words "charitable or benevolent" must be read as meaning "charitable benevolent"—that is to say, such charitable objects as are also benevolent. My first objection to B that construction is that it involves striking out the word "or," or substituting for it the word "and," and I have already given my reasons for thinking that no such violence can be done to the language of the will. The judge got over that difficulty by reading the will as a whole and finding in it an overriding intention, and he did that by first construing C the will with the omission of the words "or benevolent" and then asking himself whether the presence of those words introduced a non-charitable element into the testator's bounty. With great respect to the judge, I think that he allowed himself to be misled by approaching the problem of construction in a way which is really not permissible. D The problem before him was to construe the will as a whole, and, if one takes the vital and crucial words out of the will and makes up one's mind as to its meaning without them, and then asks oneself whether their presence makes any difference, one is apt to get the whole language into a false perspective, if I may say so with great deference to the judge. E Instead of construing the language as a whole, one construes it only in bits and then puts the bits together. I have ventured to make those respectful criticisms of the judgment of the judge in order to explain why I disagree with his method of approaching the problem. In my opinion, this appeal succeeds, and the judgment below must be reversed F and the appropriate declaration made.

Clauson, L.J.: I find myself in complete agreement with the judgment which has just been delivered by Sir Wilfrid Greene, M R. In regard to the first point, which he referred to, for convenience, as G the point of law, I must confess that I cannot bring myself to feel any doubt that, certainly in this court, the matter is completely and entirely settled, and settled in the sense in which Sir Wilfrid Greene, M.R., has indicated.

As regards the question of construction, I need scarcely say that it H is always with great hesitation that I differ from Farwell, J., particularly in a matter of construction of this kind, but my reasons for differing from him have been completely and exhaustively expressed by Sir Wilfrid Greene, M.R., and I do not think that any useful purpose would be served by attempting to repeat them. I accordingly agree that the appeal should be allowed.

GODDARD, L.J.: I agree, because the cases which have been cited, which are binding on this court, make it impossible for the judgment below to be upheld. For myself, perhaps owing to the fact that I was not brought up in this branch of law, I cannot feel any enthusiasm for this rule. Indeed, when I find a rule which says that, if property is left to trustees to give to charitable and benevolent purposes, that is good, but, if it is for charitable or benevolent purposes, it is not, I regard it with some distaste. That was described by SIR WILFRID GREENE, M.R., in *Re Horrocks, Taylor* v. *Kershaw* (7) as a trap into which the unskilled draughtsman not infrequently falls. For myself, I cannot have any doubt that the draughtsman in this case fell into a trap, because it is obvious that the testator's intention was to leave the money to charity in the popular sense of the term, and, if he had said, "I want to leave it to charitable or benevolent objects," and if it had been pointed out to him, "If you use those words, the money will go, not to charity, but to your first cousins once removed," of whose existence he himself probably did not know, then, provided that the testator was of sound mind and memory and understanding, there is not the least doubt that he would have said: "Cut out the word 'benevolent.'" The fact that I do not regard this rule with the respect which one should ever pay to long-existing rules is neither here nor there, and the cases oblige me to hold that this gift is void. It may be that the legislature will think fit to intervene and by means of a private Act restore to deserving charities the benefits which the testator intended them to receive.

Appeal allowed. Leave to appeal to the House of Lords.

Solicitors: *White & Leonard* (for the appellants); *Preston, Lane-Claypon & O'Kelly* (for the trustees); *Thomas Eggar & Son* (for the charities); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

HARRIS *v.* POLAND.

[KING'S BENCH DIVISION (Atkinson, J.), **December 17, 1940, January 10, 1941.**]

Insurance—Fire Insurance—Ignition—Goods placed in grate for safety—Fire lighted forgetting goods there.

The plaintiff, who lived in a flat, had taken out a Lloyds comprehensive policy insuring her against "loss or damage caused by fire, burglary," etc. On one occasion, having to absent herself from the flat for a whole day, she hid her jewellery, worth about £500, and a sum of money in bank notes amongst the paper and sticks in the sitting-room grate. Later, forgetting that she had done this, she lit a fire, and all except two pieces of jewellery were destroyed. She claimed their value from the insurance company. On behalf of the plaintiff, it was submitted that any accidental burning of something not intended to be consumed by fire was " damage by fire " within the meaning of the policy. The defendants contended that, where the damage done to the insured property was by fire in a place where fire was intended to be, there was no fire within the meaning of the policy :—

Held : no such limitation as that which the defendants sought to impose could be read into the policy. The true test to be applied is whether or not there has been ignition of insured property not intended to be ignited. In the circumstances, there had been such ignition, and the plaintiff was entitled to recover under the policy.

[**EDITORIAL NOTE.** In this case the underwriters did not suggest that the loss was due to the negligence of the defendant, but took their stand upon the point that the loss was not within the policy when properly construed. The underwriters contended that the fire was in the place where it was intended to be and that it was purposely ignited. It has been held, however, that the ignition of the property in the circumstances of the present case was not intentional but accidental, and that such ignition is covered by the policy.

As to Construction of Fire Policy, see HALSBURY, Hailsham Edn., Vol. 18, pp. 480, 481, paras. 724-726 ; and for Cases, see DIGEST, Vol. 29, pp. 321, 322, Nos. 2633-2647.]

Cases referred to :

(1) *Nelson Line (Liverpool), Ltd.* v. *Nelson & Sons, Ltd.*, [1908] A.C. 16 ; 41 Digest 474, *3056 ;* 77 L.J.K.B. 82 ; 97 L.T. 812.

(2) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488 ; 12 Digest 610, *5042 ;* 60 L.J.Q.B. 734 ; 65 L.T. 286.

(3) *West India Telegraph Co.* v. *Home & Colonial Insurance Co.* (1880), 6 Q.B.D. 51 ; 29 Digest 225, *1823 ;* 50 L.J.Q.B. 41 ; 43 L.T. 420.

(4) *Austin* v. *Drewe* (1816), 4 Camp. 360 ; Holt 126 ; 29 Digest 316, *2608.*

(5) *Everett* v. *London Assurance* (1865), 19 C.B.N.S. 126 ; 29 Digest 321, *2634 ;* 34 L.J.C.P. 299.

(6) *Upjohn* v. *Hitchens, Upjohn* v. *Ford*, [1918] 2 K.B. 48 ; 31 Digest 361, *5075 ;* 87 L.J.K.B. 1205 ; 119 L.T. 180.

Action under a policy of insurance to recover the value of jewellery destroyed by fire. The facts are fully set out in the judgment.

Montague Berryman for the plaintiff.

H. D. Samuels, K.C., and *Frank Soskice* for the defendant.

Atkinson, J. : The plaintiff lives in a flat at 4, Chartfield Avenue, London. In Jan., 1939, she took out a Lloyds comprehensive policy insuring her against loss by fire, burglary and housebreaking and other causes at her flat. There was an attempted burglary at her flat during the summer, which made her nervous about the safety of her jewellery while she was out and the flat was empty. She had jewellery worth about £500. On Dec. 2, she was going out for the day. She had over £100 in banknotes, and, therefore, felt more uneasy than usual about the safety of her empty flat. It occurred to her that perhaps the least likely place which a burglar would suspect as a hiding-place would be in the fireplace in the sitting-room amongst the paper and sticks under the coalite. She was probably quite right. She got a piece of newspaper and wrapped the money and the jewellery in it. Particulars of the latter are given in the statement of claim. The notes were in a registered envelope, the pearl necklace was in a soft leather *suède* case, the wrist-watch was wrapped in tissue paper, the watch set in diamonds was in a grey leather case lined with velvet, the links were in tissue paper, and were in a cotton bag along with the wrist-watch, while the rings were in tissue paper. She wrapped the articles in a newspaper and hid the parcel in the fireplace A under the coalite, mixed up with the paper already there. It may be observed that this care was very much in the interests of the underwriters on whom would fall any loss suffered from burglary.

The plaintiff returned home late in the afternoon, and, feeling cold, lighted the fire, forgetting all about what she had done. Early the B following morning, she remembered the hiding of her jewellery and money. Two of the pieces were repairable, but the rest of them and the notes had been completely destroyed by fire. The plaintiff seeks to recover the loss—agreed at £460—from the underwriters. The relevant words in the policy are to insure her " from loss or damage caused by fire . . . C burglary, housebreaking, theft or larceny " and various other causes. The plaintiff says that the loss she has suffered comes within that plain and simple language. Goods insured against loss by fire have been unintentionally either totally destroyed or badly damaged by fire, and, therefore, she says, her claim comes exactly within the language used. D

The view presented on her behalf is that, while the burning of something intended to be consumed by fire is, of course, not fire under the policy, the moment one gets the accidental burning of something not intended to be consumed by fire, there is damage by fire within the meaning of the policy, and, therefore, if insured property not intended to be consumed by E fire is ignited and thereby damaged or lost, or if insured property is damaged by heat, smoke, water or demolition caused by the burning of property not intended to be consumed by fire, there is loss or damage by fire within the meaning of the policy.

The underwriters very properly want it to be made quite clear that F they are not disputing liability on the ground of negligence, or on the ground that the loss was due to an act of forgetfulness on the part of the plaintiff, or on the ground that the loss was the inevitable result of her own act. In their view, the position is just the same as if a maid instructed by the plaintiff not to light the fire had forgotten or misunder- G stood her instructions and lighted it and so caused the loss. They agree that there has been accidental loss which would be covered by an all risks policy, but they dispute that this loss is a loss by fire within the meaning of the policy. Their case and the principle they seek through the defendant to establish is that, where damage is done to insured H property by a fire in a place where fire is intended to be—where fire has not broken bounds—the loss is not covered, because such a fire is not a fire within the meaning of the policy. It is said that there must be ignition where no ignition ought to be in order to create liability. The argument is that there must be a fortuitous fire somewhere where fire ought not to be, that it is only damage caused by such an accidental fire which comes within the policy, and that the actual burning of the insured property does not in itself constitute fire within the meaning of the policy. The idea presented is that there must be an unintentional coming of fire from its proper place to the insured property, and that the policy is not concerned with the coming of insured property to a fire which is behaving itself with perfect propriety in a place where it is intended to be.

Counsel for the defendant urges that the first question which I ought to ask myself is whether there was a fire within the meaning of the policy, and that only if I find that there was does there arise the question whether or not such fire caused damage to insured property, and he contends that it is impossible to hold that the fire, intentionally lighted, and burning quite properly in the grate, was a fire within the meaning of the policy. According to this view, the short and simple words in the policy against "loss or damage caused by fire" mean loss or damage caused to insured property by a fortuitous fire of something not intended to be consumed by fire in a place where fire is not intended to be.

The whole difference between the parties lies in those last few words. Unless there is spontaneous combustion, and apart from fires caused by electricity or lighting, the unintentional burning of insured property must, I suppose, always be caused directly or indirectly by, or must be due to, fire created intentionally of matter intended to be consumed,as, for example, domestic fires, lighted candles, oil lamps, gas jets, matches, tapers, cigarettes. Of course, one does not insure against the happening of such intended fires. One insures against the risk of insured property getting burned by unintentional contact with some such fire, or with fire started by some such fire. A householder has of necessity to make use of fire in his house for heating and lighting. He knows that fire is a source of danger, not merely from the escape of fire from its legitimate place but also from things coming in contact with it in its legitimate place in any of the forms I have just enumerated. I have no doubt that, when the ordinary man insures against loss by fire, he believes that he is insuring against every kind of loss which he may suffer from the more or less compulsory use of fire by himself or his neighbour. If he were told that the words in a Lloyds policy meant only loss from contact with fire where no fire ought to be, many questions would spring to his mind, as they spring to mine. Am I not covered, he would ask, if the wind blows something—say a valuable manuscript or a sheet of foreign stamps—into the fire in the grate, or if a careless servant drops something into the fire, or if my wife stumbles and causes her lace scarf or silver fox tie to get caught by a flame in the fire grate? To all these questions the answers of counsel for the defendant is: "No." But what if part of the scarf is consumed in the grate, and the rest of it is consumed outside the grate on the hearth-rug? Do I get compensation for the part burnt outside the grate, though not for the part burnt in the grate? Also, what if the burning scarf burns a hole in the carpet ? That is not the fault of the fire in the grate, which has not broken bounds. Am I covered for that ? Again, what is the position if the lace catches fire by coming in contact with a lighted candle on the dinner-table ? The flame of the candle is in the exact place where it is intended to be. Is it on a par with the fire in the grate ? Moreover, what if the wind blows a curtain against A a lighted gas jet and the curtain catches fire ? I imagine that the ordinary man would say : " Your policy is no use to me. I shall never know where I am. I want an underwriter who knows what he means and says what he means." There certainly ought to be some clear understanding as to the meaning of these apparently simple words, so that B persons insuring may know where they stand, and—if the defendant is right—not continue in a fool's paradise believing that they have a protection which in fact they have not.

There are one or two well-settled rules of construction with regard to policies. One is that the construction depends, not upon the presumed C intention of the parties, but upon the meaning of the words used. In *Nelson Line* (*Liverpool*), *Ltd.* v. *Nelson & Sons, Ltd.* (1), LORD LOREBURN, L.C., said, at p. 20 :

> I know of only one standard of construction, except where words have acquired a special conventional meaning, namely, what do the words mean on a fair reading, D having regard to the whole document.

There is another rule which I find summarised in *Hamlyn & Co.* v. *Wood & Co.* (2), where LORD ESHER, M.R., said, at p. 491 :

> I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises E that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.

Another rule of construction is that, as a policy is prepared by the underwriters, any ambiguity therein must be taken most strongly against the underwriters by whom it has been prepared. If a policy is reasonably F susceptible of two constructions, that one which is more favourable to the insured will be adopted. Again, in *West India Telegraph Co.* v. *Home & Colonial Insurance Co.* (3), BRETT, L.J., said, at p. 58 :

> An English policy is to be construed according to the same rules of construction which are applied by English courts to the construction of every other mercantile G instrument. Each term in the policy, and each phrase in the policy, is *prima facie* to be construed according to its ordinary meaning.

Guided by these principles, I can see no reason whatever for limiting the indemnity given by the policy in the way claimed by the defendant. In my judgment, the risks against which the plaintiff is insured include the risk of insured property coming unintentionally in contact with fire H and being thereby destroyed or damaged, and it matters not whether that fire comes to the insured property or the insured property comes to the fire. The words of the policy are just as descriptive of one as they are of the other, and I cannot read into the contract a limitation which is not there. To enable me to accept the contention of the underwriters, I should have to read something into the contract, some such words as "unless the insured property is burned by coming in contact with fire in a place where fire is intended to be." Why should I? What justification can there be for so doing? To what absurdities would it lead? A red hot cinder jumps from the fire and sets on fire some paper of value. Admittedly, there is liability. A draught from the window blows the same paper into the same fire. Is that any less an accidental loss by fire? Are the words in the policy any less applicable to the latter than they are to the former? A draught blows the flame of a candle against a curtain. Admittedly, there is liability. What if the curtain is blown against the flame of the candle, however? Surely the result must be the same. If it is not the same, the result is an absurdity. If it is the same, why should the result be different if one substitutes a fire in a grate for the lighted candle in a candlestick? Unless I am bound by authority to the contrary, or unless I can find a consensus of opinion to the contrary among textbook writers indicating a generally accepted interpretation of these words, I must give effect to the view I have formed.

Counsel for the defendant relies—and it is his only prop—upon *Austin* v. *Drewe* (4)—not, indeed, upon the actual decision, which gives him no help, but upon two sentences to be found in the summing up to the jury by GIBBS, C.J. The facts of that case were very simple [p. 360]:

> This was an action on a policy of insurance against fire. The premises insured were used as a manufactory for sugar baking. The building was divided into seven or eight storeys. On the ground floor were pans for boiling the sugar, and a stove to heat them. From the stove a chimney or flue went to the top of the building, and as it passed each floor, there was a register in it with an aperture into the rooms, whereby more or less heat might be introduced at pleasure. The upper floors were used for drying the baked sugars. One morning the fire being lighted as usual below, the servant whose duty it was to have opened the register in the highest storey forgot to do so. The consequence was, that the smoke, sparks, and heat, were completely intercepted in their progress through the flue, and were forced into the room where the sugars were drying. The smoke being perceived below, the alarm was given. One or two men were suffocated in attempting to open the register; but at last it was opened, and the mischief remedied. Had it remained shut much longer, the premises would probably have been burnt down; but in point of fact there never was more fire than was necessary to carry on the manufacture, and the flame never got beyond the flue. The sugars, however, were very much damaged by the smoke, and still more by the heat. The loss amounted to several thousand pounds. The question was whether this was a loss for which the insurance office was liable.

The headnote is as follows:

> From the negligence of a servant of the assured in not opening a register, smoke and heat from a stove used in the manufactory are forced into a room and greatly damage goods, without actually burning any, the fire not being greater than it ought to have been had there been free vent for the smoke and heat. This held not to be a loss within the policy.

Judging from the headnote, the grounds of the decision were the negligence of the plaintiff's servant and the absence of any burning of any of the insured property. Nowadays it is well-established that negligence is immaterial, and, in the case with which I have to deal, there was burning of the insured property. In the direction to the jury, however, GIBBS, C.J., said, at p. 362:

> If there is a fire, it is no answer that it was occasioned by the negligence or misconduct of servants; but in this case there was no fire except in the stove and the

> flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. But can this be said, where the fire never was at all excessive, and was always confined within its proper limits ? This is not a fire within the meaning of the policy.

There are several sources of damage from fire. There are the flames, the heat generated, and the smoke and sparks produced. Some might find it difficult to see how it could be said, when in fact smoke, sparks and excessive heat were forced into the room, that the fire was always confined within its proper limits. It could only be true of the actual flames. I asked counsel for the defendant what the position would be if the excessive heat had caused some of the bags to ignite, and the answer was that the loss would be within the policy—and yet it would have been just as true to say that the fire had not been brought out of the flue. I might put the question in a more awkward way. Suppose that some bags ignited and some were merely ruined by the heat. There would be liability for the former, but not for the latter, according to his view, yet the only distinction would be that in the one case there was ignition and in the other there was not.

The next report of this case to which I will refer is in Holt 126. There one can find little, if any, reference to this point about the fire escaping from its proper place. According to that report, I think that the ground upon which Gibbs, C.J., directed the jury was this [pp. 127, 128] :

> As no substance, therefore, was taken possession of by the fire, which was not intended to be fuel for it, as the sparks and smoke caused no mischief, but as the damage arose from an excess of heat in the rooms, occasioned by the register being shut, I am of opinion that the plaintiffs are not entitled to recover.

The main point, and the point in the forefront there, is surely that no substance was taken possession of by the fire which was not intended to be fuel for it.

The editor's note about that case is as follows, at p. 128 :

> It is not to be concluded from this case that an insurer on a policy against fire is exempt from a loss occasioned thereby, on the ground that the servants of the assured have been careless or unskilful, and that the fire was occasioned by their negligence and misconduct. An insurer would unquestionably be answerable in such a case. The spirit of the decision of the present case is this : that there was no loss by fire, by whatever cause or misconduct produced. The injury arose from the misdirection of heat, occasioned by the unskilful management of the machinery in the sugar house. It was not, therefore, in any fair and reasonable construction of the policy, one of those accidents against which the defendant had engaged to indemnify the plaintiffs.

Therefore, the test of liability according to that report and according to that note is surely whether or not something has been consumed by fire which was not intended to be consumed.

There was a motion for a new trial in the Court of Common Pleas, and I turn to the report of that motion in 6 Taunt. 436. It is interesting to read the arguments in that case and see how it was dealt with. The Solicitor-General, said this, among other things, at p. 438 :

> If actual flame was the cause of the damage, it matters not whether the fire was properly or improperly lighted, but the question is whether fire occasioned the damage. If any other criterion be taken, it would in many cases of policies against fire introduce nice and intricate questions. It cannot be necessary that the fire, to produce a loss within the policy, should be only such fire as is communicated to some substance not contained in the intended and proper receptacle of fire.

Then he goes on to give other illustrations. He has put the very point for which counsel for the defendant contends. GIBBS, C.J., is reported to have said this, at pp. 438, 439 :

> I think it is not necessary to determine any of those extreme questions. In the present case, I think no loss was sustained by any of the risks in the policy. The loss was occasioned by the extreme mismanagement by the plaintiffs of their register. A I so directed the jury, and I have no reason to alter the opinion I then formed.

Then DALLAS, J., said, at p. 439 :

> I am of the same opinion. The only cause of the damage appears to me to have been the unskilful management of the machinery by the plaintiffs' own servants, and it is therefore not a loss within the meaning of the policy.

B The rule was refused, apparently on the ground of negligence. Be that as it may, it is very difficult to argue that this case is an authority for the construction put upon it by counsel for the defendant, when it is said by GIBBS, C.J., in terms, "I think it is not necessary to determine any of those extreme questions," one of them being this very question whether C or not it is necessary that the fire should have taken place in some place other than the place where the fire was intended to be.

There was a fourth report of this same case. It is in 2 Marsh. 130. GIBBS, C.J., is reported, at p. 132, in the same language as I have just read, and DALLAS, J., said :

> D His Lordship's direction appears to me to have been perfectly right, and the jury have drawn a perfectly correct conclusion from it. There was nothing on fire which ought not to have been on fire ; and the loss was occasioned by the carelessness of the plaintiffs' themselves.

Then PARK, J., concurred. The words "There was nothing on fire which ought not to have been on fire" suggests that the test of liability E is that there must be the ignition of something which ought not to be ignited. In that case, there was no ignition of anything but the fuel, and, therefore, there was no liability, and no fire within the policy. The test is there laid down by DALLAS, J., and concurred in by PARK, J. That is exactly the case for which the plaintiff here contends—namely, F that there was ignition here of something which ought not to have been ignited, newspaper, sticks of wood, banknotes, cotton, leather, jewellery, and so on.

The next case to which I was referred was *Everett* v. *London Assurance* (5). That was a claim on a policy of insurance against fire. There had G been an explosion about a quarter of a mile away which had damaged the plaintiff's premises, so that the windows had been blown in and other damage sustained, and a claim was made that this was damage caused by fire within the meaning of the policy. The argument as to the effect of *Austin* v. *Drewe* (4) is not without interest. It took the form of a quotation H from MARSHALL ON INSURANCE, Vol. 2, Book IV (a), p. 790, which is as follows :

> In MARSHALL ON INSURANCE, Vol. 2, Book IV (a), p. 790 (Edn. 1823), it is said that "by the terms of the usual policy, the insurers undertake to pay, make good, and satisfy to the insured all loss or damage which may happen by fire during the term specified in the policy . . . In order, therefore, to bring the loss within the risk insured against, it must appear to have been occasioned by actual ignition ; and no damage occasioned by mere heat, however intense, will be within the policy.

In support of that proposition, *Austin* v. *Drewe* (4) was relied upon. It ended up with a quotation with reference to *Austin* v. *Drewe* (4) that the sugar was damaged "not by the smoke but by the excessive heat: but *nothing took fire*." Those last words, "nothing took fire," are in italics, showing that those were the words intended to be taken as the test. In that case, Byles, J., said, at p. 134:

> The expression in the policy which we have to construe is "loss or damage occasioned by fire."

That is exactly the expression which I have to construe in this case, except that I have the word "caused" instead of the word "occasioned." Then Byles, J., continues as follows, at p. 134:

> Those words are to be construed as ordinary people would construe them. They mean loss or damage either by ignition of the article consumed, or by ignition of part of the premises where the article is: in the one case there is a loss, in the other a damage, occasioned by fire. Lord Bacon says: "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."

It is a little too wide, because it is clear that there need not be ignition of part of the premises where the article is if the loss is, occasioned by the ignition of premises in the near neighbourhood, but the result is the same.

There is one other case to which I was referred, and that is *Upjohn* v. *Hitchens* (6). During the argument in that case, Scrutton, L.J., said, at p. 61:

> It has been held, however, that "fire" within the meaning of a fire policy means fire which has broken bounds, so that damage caused by excess of fire heat in an ordinary grate is not damage by fire within the policy.

I do not think that I can attach very much weight to an intervention of that kind with no argument about it, but there is something which I think is a little more relevant in the judgment of Pickford, L.J., at p. 53. In that case, there was a covenant to insure premises against loss or damage by fire, and the question was whether such damage was within a policy which did not cover the premises for damage caused by enemy aircraft. Pickford, L.J., said,

> Nor am I impressed by the other case put where it has been held that the ordinary policy against fire does not cover damage caused by overheating from a fire in an ordinary grate. There the damage was held not to be damage by fire, but damage by heating, damage caused by an ordinary domestic fire not being covered unless it sets fire to the house.

He must have used the word "house" because he was dealing with a case of fire in a house.

Substituting the words "insured property," again I find the same test laid down by Hallett, J., in a similar case. The weight of authority seems to me to be strongly in favour of the test contended for by counsel for the plaintiff, and I think that the true test is whether or not there has been an ignition of the insured property which was not intended to be ignited. If there has been, the loss is one caused by fire. That is to say, has insured property been damaged otherwise than by burning as a direct consequence of the ignition of other property not intended to be ignited ? In other words, I base my view in substance on what Dallas, J., said in *Austin* v. *Drewe* (4).

I was referred to textbooks, including one very old one, Marshall on Insurance, a quotation from which I read in *Everett's* case (5). The next, I think, was Bunyon on Insurance. There is no suggestion in Bunyon's book of this limitation about the fire being restricted to places where fire is not intended to be. There is a paragraph describing his view of the risk insured against, at p. 161 :

> The " risk " must now be construed as applicable not only to loss by fire, but also to loss by the agency of the other perils insured against. In the case of loss by fire, there must, of course, be actual ignition, not necessarily of the property itself, but of some substance near to it.

He refers to *Austin* v. *Drewe* (4) and continues as follows, at p. 162 :

> It is not, of course, necessary that the property must be itself on fire, since losses by smoke and water, when the fire has not touched the objects insured, are familiar to all managers of insurance offices. All that appears to be necessary is, that something should have caught fire, and damage have been thereby occasioned to the insured property.

The next was Macgillivray on Insurance, which was the one textbook in which counsel for the defendant could find any support for his contention, because the author says, at p. 809 :

> Fire within the meaning of a fire policy means fire which has broken bounds. There must be actual ignition where no ignition ought to be. Damage caused by excess of fire-heat in its proper place, or by smoke from a fire in its proper place, is not damage by fire. Thus, where articles are destroyed in process of manufacture by the excessive application of heat, whether by negligence or pure misadventure, the damage cannot be recovered as damage by fire, unless they have actually ignited.

I do not know exactly what that means, but at any rate there is some suggestion there on the lines of the argument of counsel for the defendant. In my view, however, a careful examination of the one authority on which that rests really negatives his argument that that case is an authority for his proposition.

Then, as a matter of interest, I was referred to Welford and Otter Barry on Fire Insurance, 2nd Edn., p. 61 :

> Any loss, therefore, occasioned by such a fire, whether by the burning of any property in the fire itself, or by the scorching or cracking of any property adjacent to it owing to its intense heat, if unaccompanied by ignition, is not covered by the contract, since the cause of the loss cannot be regarded as a peril insured against.

That line in particular, " whether by the burning of any property in the fire itself," was strongly relied upon by counsel for the defendant. However, the answer was to refer to Welford and Otter Barry on Fire Insurance, 3rd Edn., p. 59. Before one refers to what is said there, I want to refer to the preface to the third edition :

> Many questions in fire insurance are not covered by direct authority, and may still be regarded as open. In discussing such questions, an attempt has been made to answer them. . . . Another example, which is discussed for the first time in this edition, is the question whether an article which accidentally falls into a domestic fire and is burned there is destroyed by fire within the meaning of a fire policy.

There is a statement by the author that whatever may have been said in the second edition was not the result of a discussion or consideration of this particular question, and then he says, at p. 59 :

> So long as the fire is burning in the grate or furnace, it is fulfilling the purpose for which it was lighted. If, therefore, property adjacent to the fire is merely

> damaged by scorching or cracking, owing to its proximity to the fire, the loss is not covered; though the element of accident may be present, there is no ignition of the property, and nothing is on fire which ought not to be on fire. If, however, the fire breaks its bounds and, by throwing out sparks or otherwise, causes ignition to take place outside the grate or furnace, there is at once a loss by fire within the meaning of the contract. The question then arises, what is the position where property is accidentally burned in an ordinary fire, such as a domestic fire: the fire never breaks its bounds, but something which was never intended to be burned falls or is thrown by accident into the grate and is burned. In this case, equally with the case where the fire breaks its bounds, there is an accident and something is burned which ought not to have been burned. The only distinction between them is that in the one case it is the fire which escapes out of its proper place and comes into contact with the property destroyed, whereas in the other case it is the property which gets out of its proper place and comes in contact with the fire. This distinction does not appear to be sufficient to make any difference in the result. The object of the contract is to indemnify the assured against accidental loss by fire, and so long as the property is accidentally burnt, the precise nature of the accident seems to be immaterial. It may be therefore concluded that the loss in both cases falls equally within the contract.

In the textbooks, there is no clear consensus as to the meaning of these words which might force one to say that they have acquired an authorised meaning to which one can give effect. The most which counsel for the defendant can get out of the textbooks is perhaps a difference of opinion or an ambiguity. However, ambiguity is not his case, because the interpretation of those words which is most favourable to the insured must be adopted, and it seems to me that, if the underwriters wish to avoid liability, they must put words to that effect in their policy. In my judgment, the plaintiff is entitled to succeed. It is, of course, an unusual case. It has not been suggested that the loss was due to the negligence of the plaintiff. The underwriters have made it clear that they wish to stand or fall on the principle for which they have contended. I give judgment for the plaintiff for the agreed amount of £460.

Judgment for the plaintiff for £460 and costs.

Solicitors: *Cameron, Kemm & Co.* (for the plaintiff); *William Charles Crocker* (for the defendant).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

HIGGS *v.* HIGGS.

[Probate, Divorce and Admiralty Division (Lord Merriman, P., and Hodson, J.), **January 13, 1941.]**

Divorce—Summary jurisdiction—Report by probation officer—Necessity for observance of statutory provisions—Summary Procedure (Domestic Proceedings) Act, 1937 (*c.* 58), *ss.* 4, 5.

A wife living under the same roof as her husband applied to justices for a maintenance order. It appeared that both the husband and the wife were earning wages. The children had been evacuated, and the husband had regularly paid all sums due in respect of the billeting allowance. The justices, without coming to a final decision whether or not to make an order for maintenance, adjourned the hearing for a report from the probation officer. That report was before the justices at the adjourned hearing, but was not read to the parties. It dealt not only with the earnings of the parties, but also with the prospects of a reconciliation :—

Held : (i) as there had been no final decision on the merits, the report of the probation officer ought to have been confined to the means of the parties, and, in any event, should have been read to the parties and the parties should have been invited to make any objections they had to anything contained in the report.

(ii) in the circumstances of this case, it was not proper to make any order as to the custody of the children.

[**EDITORIAL NOTE.** The judgments herein fully consider the procedure of justices where they ask for the assistance of the probation officer. The matter is complicated and cannot be shortly stated, except to say that the statutory requirements must be observed in every detail. The case also touches upon the problems arising from the separation of the members of a family by reason of the war. These will be of interest so far as they go, but it seems likely that these matters will be more fully developed in subsequent cases.

For the Summary Procedure (Domestic Proceedings) Act, 1937, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 30, p. 343.]

Appeal by a husband from a decision of the Becontree justices. The facts are fully set out in the judgment of Lord Merriman, P.

Gilbert Dare for the appellant.
W. R. K. Merrylees for the respondent.

Lord Merriman, P. : This is an appeal from a decision of the justices of the Becontree Division of Essex. The husband, who is the appellant, complains of a finding by those justices on Aug. 7, 1940, that he had been guilty of wilful neglect to maintain his wife, on the strength of which the justices ordered a weekly payment of 25*s*. in her favour and 6*s*. each in respect of the two infant children, custody of whom was awarded to the wife. The husband says that there was no ground for finding him guilty of wilful neglect to maintain, that there was no material, even if he was guilty of wilful neglect, on which an order for the sum of 25*s*. could be found, having regard to the wife's own means and earning capacity, that there was no ground for awarding the custody of the children, having regard to the fact that the parties were living together at the time when the order was made and the children had been evacuated to another place under the government evacuation scheme, and that there was no ground for making any award of maintenance in respect of the children, as the husband was regularly paying the necessary billeting allowance to the proper person in respect of those children. In addition to this comprehensive list of complaints against the order, the husband also says that the whole proceeding was bad on the face of it because the justices omitted to comply with the statutory directions imposed upon them by the Summary Procedure (Domestic Proceedings) Act, 1937, in connection with the reception of the probation officer's report. In this latter respect, with which I propose to deal first, I think this case

is of considerable public importance. The case first came before the justices on June 12, 1940. Having heard the evidence on both sides, the justices said—as they were perfectly entitled to do—that the matter might be one with which the probation department could deal adequately, and accordingly they adjourned the case and made an interim order on A
a statement that they were satisfied that there was wilful neglect to provide reasonable maintenance by the husband. It is important to see, first of all, the statutory authority for that procedure. It is to be found in the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 6, which provides that, where there is an adjournment for any period B
exceeding a week, the court may order a sum not exceeding that which could be made under a final order for the maintenance of the wife and any child or children in her custody until the final determination of the case. That does not exclude the sort of determination which the justices say they had already made. Quite plainly it could only be an interim deter- C
mination. It not merely implies, but expresses, that it is the decision on the adjourned hearing which will be the final determination. So far, the justices were acting strictly within their powers and rights. Indeed, nobody has suggested that they were acting otherwise than wisely in seeking the assistance of the probation officer. D

On Aug. 7, the matter came on again for what the statute describes as the final determination. On this occasion, however, very little evidence was taken. The evidence was confined to a line and a half of the justices' note of the evidence of the complainant herself. It is common ground, however, that the justices had before them a report in writing from the E
probation officer, and it is quite plain from the reasons given by the justices for their decision that that report dealt with two things—namely, (i) the prospects of reconciliation, and (ii) the intention of the husband to make proper provision for the wife out of his earnings, which necessarily implies that it was some report as to his earnings and his means for F
making what is described as proper provision.

That brings me to a consideration of the Summary Procedure (Domestic Proceedings) Act, 1937, to which I have already alluded. This Act made provision for a procedure which, unless authorised by statute, might appear to run counter to the system on which justice is administered in G
this country—namely, that nobody shall be condemned for any offence without the opportunity of hearing the evidence on which he is to be condemned. Although it is not necessary to go into the reasons for any legislation, I have little doubt in my own mind that this Act was prompted by the fact that it was notorious that justices were, in fact, receiving E
reports from probation officers about the merits of cases before them without the parties having means of knowing what was being said about them. Accordingly, Parliament laid down in the clearest possible language a very strict code dealing with the matter. Sect. 4 deals with attempts to effect reconciliation by the probation officer, and sect. 5 deals with a probation officer's investigation into the matter of means.

The procedure in the two cases is different, and it is important to notice the distinction.

By sect. 4, it is provided that, where the court has requested a probation officer to attempt to effect a reconciliation between the parties, the probation officer may, if the attempt has proved unsuccessful and he thinks fit, in the circumstances of the case, to do so, furnish what is called by the section a statement of allegations in a form prescribed by rules made by the Lord Chancellor, which statement is to contain, first, allegations made by the applicant and the defendant respectively, and, secondly, information as to such other matters relating to the proceedings or to the parties thereto as may be so prescribed, provided that no allegation made by a party is to be included without the consent in writing of that party. By subsect. (2), where statements of allegations are furnished to the court, the probation officer is to cause copies to be delivered, or to be sent by post, to the applicant and to the defendant. Finally, by subsect. (3), where statements of allegations have been furnished to the court and delivered or sent to the applicant and the defendant under this section, the court may, if it thinks fit, make use of the statements of allegations for the purpose of putting, or causing to be put, questions to any witnesses, save, however, that nothing contained in a statement of allegations shall be received by a court as evidence. That section appears to recognise very plainly the general considerations to which I have alluded and to describe the very limited extent to which any departure from the usual rule of evidence may be permitted. However, when it comes to an inquiry into means, the procedure is different. There the section provides that, where, in any domestic proceedings, an order may be made for periodical payment of money by any person and the court has requested the probation officer to conduct an investigation as to the means of the parties, the court may direct the probation officer to report the result of his investigations to the court in accordance with the provisions of this section. Then there is a proviso to sect. 5 (1) in the following terms:

> Provided that, in the case of any such domestic proceedings . . . no direction to report to the court shall be given to a probation officer under this subsection until the court has determined all issues arising in the proceedings other than the issue as to the amount to be directed to be paid by such an order.

Then, when, in those circumstances, the probation officer has reported, by subsect. (2) the court may require the probation officer to furnish a statement in writing as to his investigations, which statement shall be read aloud in the presence of such parties to the proceedings as may be present, or he may make an oral statement to the court as to his investigation. Then, by subsect. (3), immediately after the statement of the probation officer has been read aloud or made, as the case may be, under the last foregoing section, the court shall ask each party to the proceedings whether he or she objects to anything contained in the statement, and, where objection is made, the court shall require the probation officer to give evidence on oath as to his investigations. Then, by subsect. (4), it is provided that any statement made by a probation officer in a statement furnished or made by him under the two preceding subsections may be admitted by the court as evidence, notwithstanding anything to the contrary in any enactment or rule of law relating to the admissibility of evidence. It is to be noted, however, that the report which is thus made evidence on the question of means, and on the question of means only, is not even to be called for until all other issues in the case have been determined. A

I now turn to the justices' reasons for their decision. Having received the evidence of the wife, to which I have referred, that she was not in a fit state of health to continue working, and that she had earned £2 in the two preceding weeks, the justices give their reasons as follows: B

> The justices, having come to the conclusion on the first hearing that there had been wilful neglect to maintain, received a report from the probation officer at this adjourned hearing from which it was evident that there was no disposition on the part of the husband to resume amicable relationship with his wife or to make proper provision for her out of his own earnings. A statement was furnished as to the amount of his wages, which were in excess of the amount which he had stated as his average weekly earnings. In view of the husband's means and of the wife's condition of health, the justices considered that there was no necessity for her to continue in employment, and they granted her a maintenance order accordingly. C

That quite plainly was—as, indeed, the statute prescribes that it should be—the final determination of the case. Although the justices say, as is no doubt the fact, and, indeed, as they have recorded, that on the first occasion they had come to the conclusion that there had been wilful neglect to maintain, two things are quite plain on the face of this statement of their reasons. The first is that the conclusion on the first hearing was not the final conclusion, and the second is that they received evidence on this further hearing which assisted them in coming to their final conclusion, for they say that the report, which, it is conceded on both sides, was referred to in the court as being a report in writing by the probation officer, dealt with three things—namely, (i) the possibility of reconciliation, (ii) the husband's intention to make proper provision for the wife, which is of the essence of the offence of wilful neglect to maintain, and (iii) the husband's earnings—that is to say, his means. The first two of those matters are relevant to the question of the offence, while the third of those matters is relevant to the question of amount only. D E F

It is plain beyond doubt on the face of the section that a report as to means on which the amount of the award is to be determined is to be called for and made after the other issues have been determined. Here there was a report dealing with both the merits and the amount. Whether it is regarded in so far as it deals with amount or in so far as it deals with merits, in neither case was the statute complied with in any particular. Contrary to sect. 4, it was received in evidence on the merits, and, contrary to sect. 5, it was made as a report on means before the merits had been determined, and in neither case was either party given any opportunity of knowing what was in the report or of exercising such rights as are given under the section in respect thereof. G H

I regard it as of the utmost importance that this procedure regulating the most useful and most helpful investigations by probation officers should be strictly complied with by benches of magistrates. This case is a perfect illustration of the difficulties which may arise if these regulations are not complied with. We have not the faintest idea what was in A the report, except in so far as it is reflected by the justices' findings. Speaking as I wish to speak, as far as possible generally on the matter, in emphasising the importance of considering compliance with the statute, it is also true that the more doubt there is in the particular case, the more necessary it is that these requirements should be strictly complied with. B Here we are quite plainly dealing with a borderline case, and we could not possibly with any satisfaction to ourselves decide matters which are in doubt and dispute in ignorance of the nature of the probation officer's report, and without being satisfied that the parties had the prescribed means of testing the accuracy of what appears in that report. For that C reason, I do not propose in this judgment to go into the merits of the points which still remain in controversy beyond saying that it is asserted by the husband—and there is some confirmation of that assertion on the face of the justices' decision—that the justices stated in open court that they did not intend to take into account the wife's means or earning D capacity, because it had not been their custom to do so. If that is their view of the law, it is wrong, and must be amended at once. It is their duty to take into account the means of a wife, including her earning capacity, in an appropriate case. It goes without saying that, even if a wife has been earning money, justices are not obliged to take that E fact into account if they are satisfied that she is no longer capable of doing so, or that for some legitimate reason it is inappropriate that she should go to work, but anything in the nature of a general rule that the wife's means of earning are not to be regarded is plainly contrary to the law.

F It is also open to the justices to make an order for custody where there has been a wilful neglect to maintain, and I am not prepared to dispute that, even where the parties are living together and the children are living with the parties, it may be appropriate, in certain circumstances, as being the only method of ensuring justice, that the wife shall be given G custody of the children. However, in a case where the parties are living together and the children have been evacuated under a government evacuation scheme, on the face of it, it does appear a strong measure to give the custody of the children to the wife, more particularly as it appears to me to be common ground that the husband is regularly paying the H billeting allowance. For the same reason, on the face of it, it appears to be unnecessary to order that the money for their billeting—or, to put it a little more accurately, the equivalent of their billeting money—should be ordered by way of maintenance to be paid to the proper officer of the Becontree court, when all the time the husband is paying it to the person who should receive it at the other end. These again are matters for consideration, but I suspect that their determination in this particular was governed very largely by this report of the probation officer, which we have not had the chance of seeing, and which the parties have not had the chance of testing. Of course, if it is established by some evidence that the husband, though at the moment living with his wife, intends to desert her, and intends to make no proper provision for her, that may be a good A ground for making a precautionary order for custody, but we have no legitimate means of judging whether or not that is so.

These matters must all be dealt with afresh by the Becontree bench. I think that it would be better that they should be dealt with by other members of that bench, and not by those who have already come to the B decision which is challenged here. I do not think that it would be right to accede to the suggestion that the case should be remitted to some other bench altogether, for I am quite sure that, now that the Becontree justices have heard our views upon this matter, and in particular upon not merely the desirability, but the necessity, for a strict compliance with C the statute relating to inquiries by probation officers, they will gladly be bound by what we have said and come to such determination on the merits of this case as the facts warrant. The case will be remitted to a bench of justices at Becontree.

D

HODSON, J.: I agree that this case should be remitted for further hearing. The order which was made on Aug. 7, 1940, was an order against the appellant, and was made on the grounds that he had wilfully neglected to provide reasonable maintenance for his wife and her infant children, and an order was made for the maintenance of the wife and also for the E maintenance of the children, of whom the wife was given custody.

The facts, stated quite shortly, were that, at the time when the summons was taken out in June, 1940, and, indeed, at the time of the final hearing in Aug., 1940, the husband and wife were living under the same roof and the children had been evacuated. The wife had been earning, and the F husband had been earning larger sums than the wife. In these circumstances, the matter came before the justices, who, I think, took the very proper course of adjourning the case in order that the probation officer might look into the matter to see if there was any prospect of reconciliation. That adjournment or reference to the probation officer for his G report was, as LORD MERRIMAN, P., pointed out, necessarily under the Summary Procedure (Domestic Proceedings) Act, 1937, s. 4. It must have been under sect. 4, because it was before any final determination of the matters between the parties. Upon the failure of the probation officer to bring about a reconciliation of these two people, although H they were still living together, the justices were asked to make an order without hearing any further evidence, so far as the note reveals, except a short statement by the wife to the effect that she was not in a fit state to continue work and had earned £2 in two weeks. The justices made the order stated and gave reasons for the decision. The reasons for the decision given included a reference to the report from the probation officer. It is admitted that that report from the probation officer was never in any way disclosed to the husband, or, indeed, to the wife, nor were any of the provisions of sect. 4, to which Lord Merriman, P., has referred, complied with. In those circumstances, there is on the face of it a very serious irregularity, and it is no use arguing that the justices may come to the conclusion to which they did come on the facts—namely; as to wilful neglect to maintain—without regard to this report, because this report is referred to as being part of the justices' reasons for their decision. I am sure that it is impossible for this court to leave the matter as it stands. The statute not having been complied with, and the justices having included that report in the reasons for their decision, the matter must go back for rehearing.

The investigation as to means which the probation officer may make under sect. 5, as Lord Merriman, P., has pointed out, must follow the determination of the issue between the parties. Speaking for myself, I am not sure what the justices have done on that, or how they used it, if at all, because the paragraph dealing with the probation officer's report is separate from the paragraph dealing with the husband's wages. They say in a separate paragraph :

> A statement was furnished as ot the amount of his wages which were in excess of the amount which he had stated as his average weekly earnings.

It is not clear to me whether that statement was included as a result of the evidence of the probation officer, although it is quite true that above, in the paragraph dealing with the probation officer's report, the justices refer to the lack of disposition on the part of the husband to make proper provision for his wife out of his own earnings. Of course, that may only refer to the facts that the husband thought his wife was earning enough to keep herself and that he was not prepared to give her anything out of his own earnings for her support, having regard to the fact that the children were away and nothing had to be paid for them.

In case there may be confusion about the matter in this or other benches, it is important to notice that there are two sets of circumstances in which reference may be made to probation officers, and that the procedure is different in each case. In the first case, where the matter is adjourned for reconciliation, or in order to get the parties to settle their differences out of court, the statement made by the probation officer is not in any circumstances to be evidence upon which the magistrates may base their determination of the case, whereas, in investigating means, the statement of the probation officer may be used, if the statute is complied with.

I need only add one matter to which Lord Merriman, P., also has referred—namely, the provision in the order with regard to custody. Speaking for myself, it seems to me, on the face of it, at any rate, quite inappropriate, in the circumstances of this case, to make an order for custody of these two children at all, since they have been evacuated away from the parents. The parents are together, and the father has at all times paid the sum of 6*s*. per week in respect of each child, the amount which he is called upon to pay. There may be circumstances, when parents are living together and the children are away, in which it may be necessary to make an order for custody, and that matter as well will be remitted to the justices for their consideration. I agree that this order cannot stand and must be discharged. A

Appeal allowed. Order discharged and case remitted to other justices sitting at Becontree for re-hearing.

Solicitors : *P. R. Kimber* (for the appellant) ; *Cartwright, Cunningham & Co.* (for the respondent).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*] B

READ *v.* GORDON.

[Court of Appeal (MacKinnon, Clauson and du Parcq, L.JJ.), **January 24, 1941.**] C

Landlord and Tenant — Rent restriction — Possession — Premises occupied in consequence of employment by former landlord — Occupation continued after death of former landlord under new agreement — Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), *s.* 3 (1), *Sched. I* (*g*) (i).

In 1900, the appellant entered into possession of a cottage owned by D his then employer. He was allowed to live in the cottage in consideration of a reduction of 5*s.* in his wages. On the death of his original employer, this arrangement was continued with the new owner of the business and the premises. On the death of the second employer in 1935 the business was discontinued, but the executors allowed the appellant to remain in possession upon his agreeing to pay 5*s.* per week, and gave him a rent-book in which the weekly payment of 5*s.* was described E as rent. In 1940 the respondent bought the premises with the intention of reviving the business and wished to instal his own night watchman in the cottage. He gave the appellant notice to quit, but was unable to offer any alternative accommodation. He claimed an order for possession, on the ground that the appellant was a tenant by virtue of his employment by a former landlord, and that, therefore, under the provisions of the Rent and Mortgage Interest Restrictions (Amendment) F Act, 1933, Sched. I (*g*) (i), he was entitled to possession without offering alternative accommodation :—

Held : although the respondent had originally been a tenant in consequence of his employment by a former landlord, that tenancy had been determined in 1935, and from that time he had been in occupation as a tenant without reference to his employment. In order to be entitled G to possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sched. I (*g*) (i), the respondent had to show that, at the time the notice to quit was given, the premises were let to the appellant in consequence of his employment.

[**EDITORIAL NOTE.** The matter here discussed had been before the Divisional Court on three occasions and was left in some doubt. It has now been settled by H the Court of Appeal that, in such a case, the landlord is only entitled to determine a tenancy created in consequence of the tenant's employment. If it can be found that that tenancy has been determined and a new one created, then the special provision in the Acts does not apply.

As to Possession required for Landlord's Employee, see HALSBURY, Hailsham Edn., Vol. 20, p. 331, para. 395 ; and for Cases, see DIGEST, Vol. 31, pp. 580, 581, Nos. 7283-7297.]

Cases referred to:

(1) *Lever Brothers, Ltd.* v. *Caton* (1921), 37 T.L.R. 664; 31 Digest 583, *7318.*
(2) *Murton* v. *Aldis* (1929), 141 L.T. 168; Digest Supp.
(3) *Bond* v. *Pettle* (1921), *The Times*, Jan. 15, 1921.
(4) *Davies* v. *Bristow, Penrhos College* v. *Butler*, [1920] 3 K.B. 428; 31 Digest 575, *7231*; 90 L.J.K.B. 164; 123 L.T. 655.

APPEAL by the defendant from an order of His Honour JUDGE LAWSON CAMPBELL, dated Dec. 10, 1940, sitting at the Peterborough County Court. The facts are fully set out in the judgment of MACKINNON, L.J.

Geoffrey Howard and *S. L. Elborne* for the appellant.

A. Safford for the respondent.

Howard: In the absence of an offer of suitable alternative accommodation, the county court judge had no power to make an order for possession. In the circumstances of this case, he was wrong in holding that the appellant "was in the employment of a former landlord" within the meaning of the Act as properly construed. When the business was discontinued and the appellant arranged to pay 5*s.* per week, a new tenancy without reference to any employment was created. [Counsel referred to *Bond* v. *Pettle* (3), *Lever Brothers, Ltd.* v. *Caton* (1) and *Murton* v. *Aldis* (2).]

Safford: I accept the view that one must inquire if the occupancy was in consequence of the tenant's employment. It is sufficient if it was so at the commencement. In this case, the letting originally made has never been terminated. The Act does not require that the employment shall be continuous. The words of the schedule are: "was in the employment of the landlord or a former landlord." There is nothing in this case from which the court can infer a new tenancy when the business was discontinued. No such inference can be made, because in 1935 the landlord could not have obtained possession without an order of the court. [Counsel referred to *Davies* v. *Bristow* (4).]

MACKINNON, L.J.: The plaintiff was the owner of a small house or cottage in Peterborough, and the defendant was the occupier of it. The plaintiff served notice to quit upon the defendant, and then commenced proceedings in the county court claiming possession of the premises. The defendant was paying a rent of only 5*s.* per week, and, quite clearly, the premises were subject to the Rent Restriction Acts. *Prima facie*, the first answer of the defendant was sect. 3 of the Act of 1933, which provides as follows:

> (1) No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply . . . shall be . . . given unless . . . (*a*) the court has power so to do under the provisions set out in the first schedule to this Act; or (*b*) the court is satisfied that suitable alternative accommodation is available for the tenant . . .

There was no suggestion here that the plaintiff was able to provide alternative accommodation for the defendant.. Therefore, in order to prevent himself from being barred by this section, the plaintiff had to satisfy the court that it had power to give him possession under the terms set out in the first schedule. In the first schedule, it is provided that the court shall have:

> . . . power to . . . give an order or judgment for the recovery of possession . . . without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . .

Then various alternatives are set out. One alternative, and this is the one on which the plaintiff relied, is as follows:

> (*g*) the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment . . . and either (i) the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment. . . .

The plaintiff said: "I require the occupation for an employee of mine." There is no question about that. The real issue is whether the plaintiff could successfully assert to the defendant: "You were in my employment or in that of a former landlord, and this house was let to you in consequence of that employment."

The facts, as to which there is no dispute, were these. Somewhere about 1900, the defendant entered the employment of a man named Foot. He worked for him on the terms that he should be allowed to live in this cottage and should be paid 16*s*. per week wages, it being understood that the value of his occupation of the cottage represented an extra 5*s*., so that it might have been that he would have been paid 21*s*. wages, and have repaid 5*s*. of it as rent for the cottage. In 1905, Foot, who had been employing Gordon on those terms, died, and his business was sold by his executors to one Snow, and Gordon continued with Snow upon the same arrangement. For 30 years, while Snow was carrying on the business, Gordon worked for him, and continued to live in the cottage at the notional rent of 5*s*. per week. Then in 1935 Snow died. His executors decided that they would discontinue the business, and, therefore, Gordon's employment in the business (which would, in those circumstances, disappear) had to come to an end. However, he was still in the cottage, and the executors arranged with him that he should occupy the cottage at a rent of 5*s*. per week. They issued to him a rent book describing that 5*s*. as a rent.

In my view, quite clearly what happened then was that Snow's executors ceased to be the employers of Gordon, and they ceased to employ anybody. They ceased to be the owners of a business for one purpose of which they provided accommodation for an employee. They had abandoned the business, but, having the ownership of this cottage, they transformed themselves into owners of a small house property, and let it to Gordon by agreement with him as a tenant, and gave him a rent book. Gordon found employment with other people, and for five years continued to work for somebody else, living in this cottage and paying his proper rent to Snow's executors.

In 1940, Snow's executors sold all the property to the plaintiff, who was minded to re-start the old business which Foot and Snow had successively carried on, and which had been abandoned and given up by Snow's executors 5 years before. It was a business of storing house furniture. The plaintiff wanted to use this cottage as a place where he could instal one of his workmen in this business which he was going to re-start in the old premises. Accordingly, he served a notice to quit upon the defendant, and started the proceedings to which I have referred.

Those are the facts, and there is no dispute about them. The judge has found, I think—and clearly, upon the evidence, could not fail to find—that, though originally in 1900 or 1905 this house was let to Gordon by reason of his occupation, in 1935 there was a new letting by the executors to the defendant. However, he goes on to hold, to use his own words:

> . . . the material words of (*g*) (i) are " was let," and these words seem to be satisfied if the house was at any time let.

That is to say, if the house was let to Gordon by a new agreement in 1935, inasmuch as 30 years before it had been let to him by reason of his occupation, the previous letting is sufficient to satisfy the requirement of this condition.

That was the view stated by Bray, J., in a case of a somewhat similar character, *Lever Brothers, Ltd.* v. *Caton* (1), where Bray, J. said, at p. 665:

> I think that we must go back to the original letting, which here was in consequence of the employment.

That is to say that the original letting having been part of the original employment, it was immaterial that, at the date when possession was claimed, the tenant was in occupation by virtue of a new agreement not connected with his employment. It is to be noted that Lush, J., the other member of the Divisional Court, did not accept that argument at all. He reached the same result as Bray, J., but upon the ground that there was in fact no new agreement entered into, inferentially saying that, if there had been a new agreement, he would have been of the opinion that the appeal ought to be allowed.

That case was considered in a very similar case, *Murton* v. *Aldis* (2), in which the Divisional Court, consisting of Lord Hewart, L.C.J., and Avory and Swift, JJ., came to a different conclusion on the facts from that arrived at in *Lever Brothers, Ltd.* v. *Caton* (1), and incidentally expressed their disapproval of the reasoning of Bray, J., in *Lever Brothers, Ltd.* v. *Caton* (1), which reasoning was precisely that which has been accepted by the county court judge in the present case. They disapproved of that reasoning partly upon the decision in *Bond* v. *Pettle* (3). There is one sentence in the judgment of Lord Coleridge in *Bond* v. *Pettle* (3) which I think puts the whole point which arose in that case and arises in this present case. Lord Coleridge said:

> The question is whether the tenant at the crucial time, not at some other time, was a tenant in consequence of the employment.

I think that the crucial question in this case is whether at the crucial time—namely, the date when the plaintiff issued his plaint against the defendant—Gordon was a tenant at that date in the employment of the landlord. Clearly, he was not. Was he a tenant in the employment of the former landlord ? He was. However, the question is whether, at the crucial time, the dwelling-house was let to him in consequence of that employment. I do not think that it was. I think that he was tenant there, not by virtue of the employment, which had ceased in 1935, but by virtue of a new agreement entered into between him and A Snow's executors in 1935. As I have said, that is really the finding of fact of the judge in this case, but, on his construction of the section he has held that that is immaterial. I think that it is material. The result is that the plaintiff failed to bring himself within the provisions of the first schedule, that the defendant was entitled to the protection of B sect. 3 of the Act of 1933, and that no order for possession ought to have been made against him. This appeal succeeds and should be allowed with costs.

CLAUSON, L.J. : I agree, for precisely the same reasons. I would C only add this observation. It is quite immaterial to the present case, but the point might be raised in some other case. MACKINNON, L.J., spoke of the crucial moment as the moment of the issue of the plaint. If it were essential to consider it, I am not sure that one might not find that the crucial moment was the moment of the issue of the notice to D quit, which leads to the right to apply to the county court. It is quite immaterial in this case, but I thought that I ought to make that clear.

DU PARCQ, L.J. : I also agree, and have nothing to add to what has been said by MACKINNON and CLAUSON, L.JJ. E

MACKINNON, L.J., stated that he agreed with the observation of CLAUSON, L.J.

Appeal allowed with costs in both courts.

Solicitors : *J. D. Langton & Passmore*, agents for *Mellows & Sons*, F Peterborough (for the appellant) ; *J. Hunt*, Peterborough (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

G

PORTMAN *v.* ROSKILL & SONS.

[CHANCERY DIVISION (Farwell, J.), **January 17, 1941.**]

H

County Courts—Transfer of proceedings to High Court—Transfer to Chancery Division—Ex parte application not available—County Courts Act, 1934 (*c.* 53), *s.* 111.

Applications for leave to transfer proceedings from the county court to the Chancery Division should be by originating summons before the master, who can, if necessary, adjourn the matter into court. They cannot be made *ex parte* as that practice is not suitable to the Chancery Division.

[**EDITORIAL NOTE.** The decision here concerns only the practice of the Chancery Division. The matter was left open in *Metropolitan Leather Co.* v. *Herrmann*, [1941] 1 All E. R. 30 ; Digest Supp., but it was obvious that it was thought that an *ex parte* application was not suited to the circumstances. It is now decided that such an application must be made only by taking out a summons.

AS TO TRANSFER OF ACTIONS FROM COUNTY COURT TO HIGH COURT, see HALSBURY, Hailsham Edn., Vol. 8, pp. 232-234, paras. 424-429 ; and FOR CASES, see DIGEST, Vol. 13, pp. 495, 496, Nos. 445-456.]

APPLICATION under the County Courts Act, 1934, s. 111, for leave to transfer proceedings for disclaimer under the Landlord and Tenant (War Damage) Act, 1939, from the St. Marylebone County Court to the Chancery Division. Proceedings were pending in the St. Marylebone County Court in which the landlord asked for a declaration that the lessees' notice of disclaimer was invalid, as the lease was a ground lease. The lessees applied to the county court for the removal of the proceedings to the Chancery Division. The landlord supported the application.

D. Cohen for the applicants.

I. J. Lindner for the respondent.

FARWELL, J. : Since a similar matter came before me recently, I have looked into the matter further, and I do not think that the statement in THE ANNUAL PRACTICE is correct. I am not going to refuse this application, as the respondent has no objection. I should like to make it plain that I do not think that the statement in THE ANNUAL PRACTICE, 1940, p. 2593 applies, at any rate, to this division. It may be the right practice in the King's Bench Division, but I do not think that it is the practice here, and I consider that it is an undesirable practice, to hear such an application *ex parte*. It is quite obvious that the plaintiff is entitled to choose his own tribunal, and, if he chooses the county court, the matter should not be removed therefrom except in his presence and after his submissions have been made to the court. The proper course in the Chancery Division is to take out a summons, which is served on the respondent, and which, in the first instance, comes before the master. The master can, if he thinks it a proper case, and subject to the other party's rights, make an order to have it adjourned to the judge. I am not suggesting that counsel was wrong, because he had accepted the views already expressed that these applications were made *ex parte*. I am now satisfied that that is not the practice in this Division. The order on the summons should state the judge to whom the matter has been assigned, and it is desirable that it should be known that this is the proper practice in the Chancery Division.

Application granted.

Solicitors : *Ashurst, Morris, Crisp & Co.* (for the applicant) ; *Wilde, Sapte & Co.* (for the respondent).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Considered. Hill v. Luton Corpn. [1951] 2 K. B. 387

BATTING *v.* LONDON PASSE ORT BOARD.

[Court of Appeal (Sir Wilfrid Greene, M.R., Goddard and du Parcq, L.JJ.), **January 20, 1941.**]

Limitation of Actions—Amendment of statement of claim stating new cause of action—Action against public authority—Period of limitation extended after expiration of period allowed by earlier Act—Public Authorities Protection Act, 1893 (*c.* 61), *s.* 1—*Limitation Act,* 1939 (*c.* 21), *ss.* 21, 33 (*a*).

The plaintiff was injured in an accident on Dec. 11, 1939. On Apr. 19, 1940, she issued a writ against the defendants, who were admittedly a public authority and entitled to the protection given by the Public Authorities Protection Act, 1893. The writ did not specify any particular class of negligence, but on May 28, 1940, a statement of claim was delivered which made an allegation of negligent driving by the driver of one of the defendants' tramcars. On Nov. 1, 1940, after the expiration of the 6-months period allowed by the Act of 1893, an application was made for leave to deliver an amended statement of claim, the amendments setting up that the defendants were negligent in the maintenance of the roadway and the tram tracks. On July 1, 1940, the Limitation Act, 1939, came into force, and by sect. 34 (2) of that Act the period of limitation was changed from 6 months to 12 months. It was contended that, although the application to amend the statement of claim was out of time having regard to the 1893 Act, yet it was in time owing to the coming into operation of the 1939 Act :—

Held : the cause of action originally set up having been barred before the 1939 Act came into operation, no new cause of action could afterwards be set up, and leave to amend the statement of claim should be refused.

Marshall v. *London Passenger Transport Board* (1) *applied.*

[**EDITORIAL NOTE.** It was clearly settled in *Marshall* v. *London Passenger Transport Board* (1) that a new form of negligence could not be added by amendment after the expiration of a period of limitation. On this point, the facts were precisely the same in both cases. It was sought in the present case to argue that, as the extended period of limitation under the 1939 Act came into operation before the amendment was proposed to be made, the position had thereby been altered in favour of the plaintiff. This argument is rejected, and the Limitation Act, 1939, does not save a claim which was already barred at the time when it came into operation.

As to Refusal of Amendments by Reason of the Statutory Bar, see HALSBURY, Hailsham Edn., Vol. 20, pp. 784, 785, para. 1087 ; and for Cases, see DIGEST, Vol. 32, pp. 536, 537, Nos. 1891-1897.]

Case referred to :

(1) *Marshall* v. *London Passenger Transport Board,* [1936] 3 All E.R. 83 ; Digest Supp.

Interlocutory Appeal by the defendants from an order of Wrottesley, J., dated Dec. 3, 1940, permitting an amendment to the statement of claim in the action, which amendment had been refused by Master Jelf on Nov. 15, 1940. The facts are fully set out in the judgment of Sir Wilfrid Greene, M.R.

N. R. Fox-Andrews for the appellants.

Phineas Quass for the respondent.

Fox-Andrews : The application should have been dismissed in accordance with the decision in *Marshall* v. *London Passenger Transport Board* (1),

because the facts of that case are practically indistinguishable from those of the present case. It is said on behalf of the plaintiff, however, that, by reason of the Limitation Act, 1939, s. 21, the period applicable to the present case is one year, and not 6 months. Sect. 33 of the Act,
A however, states that nothing in the Act shall enable any action to be brought which was barred before the commencement of the Act by any enactment repealed by the Act. The Limitation Act, 1939, came into operation after the period of 6 months allowed by the Public Authorities Protection Act, 1893, had expired. That being so, the earlier Act must
B have been in operation when the period of 6 months expired.

Quass : The action was already in existence when the Limitation Act, 1939, came into operation. Therefore, an amendment to the statement of claim should be permitted. If the plaintiff is not allowed to pursue her claim, the state of affairs will be peculiar. The writ was issued before
C the period of 6 months had expired. The statement of claim had been filed. In that statement of claim, the plaintiff might have alleged any act of negligence. When the statement of claim in *Marshall* v. *London Passenger Transport Board* (1) was delivered, it might have contained a claim in respect of any act of negligence.

D

SIR WILFRID GREENE, M.R. : This appeal raises a short point with regard to which I must confess I have no doubt. On Dec. 11, 1939, the plaintiff was involved in an accident in which she was injured by a tramcar belonging to the defendants, the London Passenger Transport
E Board. The defendants are admittedly a public authority, and, accordingly, the period of 6 months within which the action had to be commenced expired on June 11, 1940, under the Public Authorities Protection Act then in force. The writ was issued in due time on Apr. 19, 1940, and, although we have not a copy of it, we are told that it claimed damages
F for negligence without specifying the particular type of negligence of which the defendants were alleged to have been guilty. On May 28, 1940, a statement of claim was delivered which made that matter clear, because the only allegation against the defendant was one of negligent driving by the tramcar driver. On Nov. 1, 1940—that is to say, some
G months after the period of 6 months had expired—an application was made on behalf of the plaintiff to Master JELF asking for leave to deliver an amended statement of claim. The amendments desired set up a new and different case of negligence, based on an allegation that the defendants were negligent in maintaining the roadway and the tram
H tracks in an unsafe condition, as the result of which the plaintiff says that she tripped and fell in front of the tramcar. That, of course, was an entirely new cause of action. It is true that the writ as issued and served did not specify any particular class of negligence, and in so doing, as appears from the judgment of this court in *Marshall* v. *London Passenger Transport Board* (1), the writ was in point of form defective, but, when the statement of claim was delivered, the plaintiff made it clear what her

writ meant, namely, that the negligence of which she complained was the negligence alleged in the original statement of claim, that is to say, negligent driving, and nothing else. Accordingly, the amendment, if it were allowed, would result in the raising of an entirely new case of negligence not covered by the writ at all, a case which, in view of the date of the application, would have been raised for the first time several months after the expiration of the period of 6 months mentioned in the Public Authorities Protection Act, 1893.

In this state of affairs, it is not disputed on behalf of the plaintiff that, but for the point I am about to mention, *Marshall* v. *London Passenger Transport Board* (1) would have entirely governed this case. It is suggested, however, that that position has been changed by reason of the Limitation Act, 1939, which, under sect. 34 (2), came into operation on July 1, 1940, some 19 days after the expiration of the period of 6 months which was the period under the original Public Authorities Protection Act. The Act of 1939 in sect. 21 introduces a new period of limitation of one year in place of the old period of 6 months in the case of actions against public authorities, but the position of actions already barred under the existing statute was preserved by sect. 33 (*a*), which provides as follows:

> Nothing in this Act shall (*a*) enable any action to be brought which was barred before the commencement of this Act by an enactment repealed by this Act [except in the case of revival by acknowledgment or part payment.]

Those matters are not relevant to the present point. In the schedule among the enactments repealed there appears the Public Authorities Protection Act, 1893, s. 1 (*a*), except so far as it relates to criminal proceedings. Therefore, it seems clear to me that this new claim which it is sought to import into the action was a claim in respect of which no action could have been brought after June 11, 1940, and that the new period of 12 months introduced by sect. 21 of the Act does not apply. That cause of action was completely barred before the Act of 1939 came into operation. The result is, therefore, that this appeal, which is an appeal against an order of Wrottesley, J., must be allowed, and the result is that the original application must stand dismissed, as, indeed, it was dismissed by Master Jelf. The costs should be the costs of the defendants in any event.

Goddard, L.J.: I agree.

du Parcq, L.J.: I agree.

Appeal allowed with costs.

Solicitors: *R. B. McDonald* (for the appellants); *Arthur Dollond & Co.* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

MURFIN *v.* ASHBRIDGE & MARTIN.

[Court of Appeal (Sir Wilfrid Greene, M.R., Goddard and du Parcq, L.JJ.), **January 20, 1941.**]

Practice—Running-down action—Order for substituted service—Appeal by insurers in own name to have order set aside—Insurers not parties to action—Policy giving insurers control of proceedings.

In an action against a motorist for personal injuries, the defendant could not be found, and an order was made for substituted service. The defendant's policy of insurance contained the usual clause giving the insurers control of any litigation thereunder, and, in pursuance of that clause, the insurers entered a conditional appearance on behalf of the defendant. Thereafter certain interlocutory proceedings were taken in the name of the insurers:—

Held: although the insurers had control of the proceedings, and could take any step in those proceedings in the name of the defendant, they were not parties to the action, and no application or appeal could be made in their name.

[**EDITORIAL NOTE.** It is well known that the modern form of policy in the case of motor insurance gives the insurers control of any proceedings which may be commenced. It was decided in *Windsor* v. *Chalcraft* (1) that the insurers, as the persons liable to pay any damages recovered against their insured, were parties aggrieved by a judgment in default of appearance and could come in to set it aside. It was here sought to extend that doctrine to enable the insurers to come in and set aside an interlocutory order in the action by the injured party against the insured. Here, however, the rule of practice is that only a party to the action can be heard or make any application in the action. The insurers, therefore, cannot make any application in their own name, but must make it in the name of the insured. This is purely a question of how the application is framed, but, as will be seen from the judgment, if the application is made in the wrong name, it inevitably leads to an order for costs against the solicitor personally.

As to Setting Aside Order for Substituted Service, see HALSBURY, Hailsham Edn., Vol. 26, p. 36, para. 52; and for Cases, see DIGEST, Practice, pp. 380, 381, Nos. 875-880.]

Cases referred to:

(1) *Windsor* v. *Chalcraft*, [1939] 1 K.B. 279; [1938] 2 All E.R. 751; Digest Supp.; 107 L.J.K.B. 609; 159 L.T. 104.

(2) *Jacques* v. *Harrison* (1883), 12 Q.B.D. 136; Digest, Practice, 391, *948*; 53 L.J.Q.B. 137; 50 L.T. 246; *subsequent proceedings* (1884), 12 Q.B.D. 165.

(3) *Porter* v. *Freudenberg, Kreglinger* v. *Samuel (S.) & Rosenfeld, Re Merten's Patents*, [1915] 1 K.B. 858; Digest, Practice, 329, *481*; 84 L.J.K.B. 1001; 112 L.T. 313.

Appeal by the defendant Garthwaite, an underwriter, in his own name, from an order of Stable, J., dismissing an appeal asking that an order for substituted service on a defendant should be set aside. The facts are fully set out in the judgment of Sir Wilfrid Greene, M.R.

N. R. Fox-Andrews for the appellant.

Montague Berryman for the respondents.

Fox-Andrews: The basis of the decision in *Windsor* v. *Chalcraft* (1) was that the Road Traffic Act, 1934, rendered the insurer liable to satisfy a judgment against the assured. The position which arises now is that, unless the insurer can take in this case a course similar to that taken in *Windsor* v. *Chalcraft* (1), anyone may have proceedings taken against him without the knowledge of the insurers. Having been unsuccessful in finding Martin, the plaintiff's solicitor applied for an order for substituted service. It would not be right for the insurer to wait until the cost of proceedings had been incurred before indicating that he intended to rely upon his rights. Unless insurers could take advantage of the decision in *Windsor* v. *Chalcraft* (1), they would have to allow litigation to be concluded before they could intervene. [Counsel referred to *Porter* v. *Freudenberg* (3).]

Counsel for the respondents was not called upon.

Sir Wilfrid Greene, M.R.: This action is by a man who was injured in an accident. He was riding on the pillion of the motorcycle of the first defendant, Ashbridge, which was in collision with a motor car driven by the other defendant, Edward Tom Martin. There has been difficulty in tracing Martin, and on June 12, 1940, an order was made by the registrar of the Sheffield District Registry for substituted service of the writ upon Martin by advertisement in the *Birmingham Post*. It is that order which is complained of, and it is that order which hitherto, in the course of these interlocutory proceedings from the registrar to the master and from the master to the judge, has been left untouched. The next thing which happened was that a conditional appearance was entered for the defendant Edward Tom Martin on June 28, 1940. That conditional appearance having been entered, the necessity for substituted service has disappeared. The defendant had come and had appeared to the writ. It is true that it was a conditional appearance, and the defendant could, within ten days, apply to have service of the writ set aside, but at this date there had not been any service at all, substituted or otherwise. However, that does not matter. The defendant has appeared. He has not applied within ten days to set aside the writ or service, and the appearance, therefore, is now unconditional. He is a party to the action who has appeared in the action, and he has all the rights of a party so appearing.

So far, the matter appears to be perfectly simple, but now this complication arises. The appearance was entered, not upon instructions by Martin personally, whose whereabouts I have said are unknown, but by the solicitors acting for a group of underwriters who had underwritten the motor insurance policy which Martin held. That was in pursuance of the ordinary clause which, we are told, appears in the policy, under which the solicitors for the underwriters may conduct the whole litigation on behalf of the assured. If the matter had stood there, the litigation would have proceeded in the ordinary way. Judgment, if judgment were obtained, would have been against Martin, and the underwriters would have had control of the litigation. If they could not find Martin, it would be a misfortune for them. They would have to fight the action without their most essential witness, but that would be their misfortune, and not the plaintiff's fault.

Now comes the beginning of the misunderstandings which have led to the complications in this case. It appears that on July 4, 1940, the solicitors for the plaintiff and the solicitor for Garthwaite, who is one of the group of underwriters concerned, appeared before Master Moseley, and they seem to have put their heads together, because the result of their deliberations was the following remarkable order :

> Upon hearing the solicitors on both sides, it is ordered that William Garthwaite, on behalf of himself and others underwriters of Ensign Motor Policies at Lloyds, be at liberty to appear on behalf of the defendant Edward Tom Martin, one of the defendants in this action.

Why it was thought necessary to apply for such an order, or, with all respect to the master, proper to make it, I cannot understand. The solicitors for Garthwaite and the other underwriters were conducting the litigation on behalf of the defendant Martin, for whom they had entered an appearance. There was no necessity whatsoever for an order that Garthwaite, on behalf of himself and other underwriters, should be at liberty to appear on behalf of the defendant Edward Tom Martin, nor do I know under what rule such an order could possibly be made. If a solicitor enters appearance for a defendant in an action, either he has authority to do it or he has not. If he has not, the appearance can be set aside, and he can be ordered to pay the costs personally. If he has authority to do it, then there is no reason at all for an order of this kind, because the appearance is regularly entered pursuant to the authority of the defendant himself.

That unfortunate mistake led to the further complications which ultimately brought the matter before us. On July 8, William Garthwaite by his solicitors served a notice on the solicitors to the plaintiff, but Garthwaite was no party to this action at all. He was not a defendant. No order had been made adding him as a defendant, and, indeed, I do not know of any rule under which he could have been so added. Nevertheless, the notice to which I have just referred says :

> William Garthwaite intends to apply to Master Moseley in chambers . . . for an order that the order for substituted service of the district registrar and the service of the writ of summons herein upon the defendant Edward Tom Martin be set aside [on the grounds stated].

Garthwaite had no *locus standi* at all to make that application, and it ought to have been dealt with accordingly. If the solicitors for Martin had thought that, for some reason or other, some useful purpose would be served by endeavouring to get that order for substituted service set aside, it was in Martin's name that such an application ought to have been made. Instead of that, it was made in the name of a person who had no connection with this action whatsoever for any relevant purpose of procedure.

That application came before Master Moseley on Sept. 24, and he made no order. Now comes another mysterious document. It appears that on Oct. 25, 1940, Stable, J., dealt with an application which was on the face of it an appeal by the defendant Martin against the decision of

Master Moseley, dated Sept. 24, 1940, refusing to set aside the order for substituted service. Be it observed that Martin had never appealed against the order of the registrar at all. Garthwaite had purported to appeal to the master, but his appeal ought to have been struck out. The only person who could appeal from that order was Martin, and Martin did A not in fact appeal, and his 10 days in due course elapsed. How it came about that Stable, J., was persuaded to entertain an appeal by Martin against an order which dealt with an application made, not by Martin, but by Garthwaite, who had no right to make it, I cannot understand. I must suppose that the judge was under some misapprehension as to the position B of the matter, because that appeal ought to have been struck out, just as Garthwaite's application to Master Moseley ought to have been struck out. However, the matter does not stop there, because on Dec. 13, 1940, Wrottesley, J., heard an application which is described in the order as "an appeal of Garthwaite against a decision of Master Moseley C of Sept. 24." It would appear, therefore, that the appeal in the name of Martin which I have already mentioned having failed, Garthwaite thought that he would appeal in his own name, and he appealed to Wrottesley, J. That appeal was quite rightly dismissed. Garthwaite had no *locus standi* either for his application to Master Moseley or for his appeal from D Master Moseley to Wrottesley, J. Here again, however, unfortunately (I cannot help thinking through some misapprehension on the part of the judge), that order contains this remarkable passage:

> . . . and the said William Garthwaite undertaking by his counsel and solicitors to enter an appearance forthwith.

E

I hesitate to repeat what I have already pointed out—namely, that Garthwaite was not a party to this action at all, and could not enter an appearance. That passage in the order, which, we were told, was put in by consent, ought never to have been put there at all.

Garthwaite now appeals to this court from the order of Stable, J. F Be it observed, however, that the order of Stable, J., against which this appeal is made, was made, not on an appeal by Garthwaite, but on an appeal by Martin. What possible *locus standi* Garthwaite can be supposed to have to appeal from such an order (apart from other objections) I cannot see, but, as I have already pointed out, the original application G by Garthwaite to Master Moseley ought to have been struck out, the appeal by Garthwaite to Wrottesley, J., ought to have been struck out, and the appeal by Garthwaite to this court must, accordingly, be struck out. It is not competent.

The result is, therefore, that the present so-called appeal, not being H competent, will be struck out. However—and this is a purely technical matter—the proper order, and, indeed, the only order, as to costs which the court can make must be an order against the solicitors personally who launched this appeal. The court has jurisdiction over them, and can order them to pay costs. Garthwaite is not a party, and the court cannot deal with him. In the present case, it will make no practical difference, but, as a matter of form, the order in cases of this kind should be an order against the solicitors personally to pay the costs.

Goddard, L.J.: I agree. It seems to me that this unfortunate story has resulted from the very simple decision, when it is properly understood, given by this court in *Windsor* v. *Chalcraft* (1). In that case, the defendant did not appear, and gave no notice to his insurance company. His insurance company knew nothing about the action, and did not appear until after a default judgment had been signed and, I suppose, damages assessed. Thereupon the insurance company, as persons interested under the doctrine laid down in *Jacques* v. *Harrison* (2), applied, under R.S.C., Ord. 27, r. 16, to have the judgment set aside. The judgment was set aside so that they might be admitted to defend the action in the name of the defendant, but, of course, they could come in if they chose to defend the action in the name of their assured. Under the common terms of the motor insurance policy, they have that right. Counsel for the appellant has said: "If they had not applied in this case to set aside service, or taken some such step, they would have been open to criticism, or, if they had not come into the proceedings, they would have been open to criticism." I do not understand that. They could decide for themselves whether or not they would defend the action. Their real complaint, as I understand it, was that, as they could not find their assured, they would not be able to put up a very good defence to the action. As Sir Wilfrid Greene, M.R., has pointed out, that is their misfortune, but it is not the plaintiff's fault. Possibly—I only throw this out in case there is any difficulty hereafter—in an order for substituted service in these cases it may be a proper thing to order substituted service on a defendant by serving his insurers. They are the people who are really interested, and, if they want to defend the action, they can do so. The decision in *Windsor* v. *Chalcraft* (1), however, is no excuse and no reason for any of the very curious orders which have been made in this case. I agree that this appeal is wholly incompetent and that these orders ought never to have been made here. I agree, therefore, with the order proposed by Sir Wilfrid Greene, M.R.

du Parcq, L.J.: I agree with the proposed order for the reasons already given by Sir Wilfrid Greene, M.R., and by Goddard, L.J.

Solicitors: *L. Bingham & Co.* (for the appellant); *Berrymans*, agents for *L. H. Brittain*, Rotherham (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re WHITE, MASTAKA *v.* MIDLAND BANK EXECUTOR TRUSTEE CO., LTD. AND LAUDERDALE.

[CHANCERY DIVISION (Farwell, J.), **January 15, 1941.**]

Wills—Family provision—Testator's domicil—Necessity to prove at date of death—Inheritance (Family Provision) Act, 1938 (*c.* 45), *s.* 1.

In making an aplication under the Inheritance (Family Provision) Act, 1938, the applicant must prove that the domicil of the testator at the time of his death was English.

[**EDITORIAL NOTE.** The Inheritance (Family Provision) Act, 1938, by its terms only applies in cases where the testator dies domiciled in England. In most cases no question of domicil will arise, for the parties will have lived in England all their lives. The present case shows, however, that the fact that a testatrix has been married in England and has lived there for the rest of her life is by no means conclusive proof of English domicil; but it deals only with the negative aspect of what is insufficient proof, and no doubt other cases will be determined where the question of sufficiency of proof will be more particularly discussed.

AS TO PROTECTION OF TESTATOR'S FAMILY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505.]

APPLICATION under the Inheritance (Family Provision) Act, 1938, by Joan Patricia Mastaka, an infant, by her next friend, Teresa Mary Ward, for reasonable provision for maintenance out of the estate of her mother, the testatrix, Elizabeth Isabel White

A. S. Diamond for the applicant.

Lindsay M. Jopling for the respondents.

FARWELL, J.: The facts of this case are a little unusual. The plaintiff is the daughter of a woman named Elizabeth Isabel White, who married a man called Mastaka a few weeeks before the plaintiff was born. The father and mother separated shortly after the marriage, and, when the infant was about a year old, she was handed over to the care of a Mrs. Ward, who has looked after her ever since. For about 5 years a sum of 15*s.* per week was given to Mrs. Ward in consideration of her maintaining the infant, and then a lump sum of £40, but as from that time no contribution has been made for the child's maintenance at all, either by the mother or by the father. The infant plaintiff is undoubtedly suffering from some disability. She has the misfortune to suffer from a deformity of the hip, and she has difficulty in getting about, which no doubt will preclude her from doing certain types of work. That she is, by her disability, completely disabled from earning a living is not, I think, the fact.

The mother seems to have had very little to do with her daughter during their joint lifetimes. Although she did go down to see the daughter at Mrs. Ward's house from time to time, and, at some time when she was living with a person who was not her husband, she invited the daughter to go and make a home with her, but the daughter, under Mrs. Ward's advice, came to the conclusion that it would not be a desirable thing for her to do, and she refused the invitation. Except that they did meet from time to time, the mother and daughter were more or less in the position of friends and nothing more towards each other.

The mother died on Oct. 7, 1939, having made a will on Aug. 4, 1939. Under that will, she made no provision for her daughter at all. She made certain legacies, and then she gave certain ordinary shares in the National Star Brick and Tile Holdings, Ltd., upon trust for William Greenslade "to receive the income thereof during his life," and thereafter upon trust for her sister, Hilda Ester Lauderdale. She gave the residuary estate to William Greenslade. There will, I think, be no residue, and the only portion of her estate of any value is the shares. Although they are not very easy to realise at the moment, they have some value, and they do apparently pay some dividends. In those circumstances, the daughter asks the court to say that, her mother having failed to make any provision for her, the court ought to make such provision. I think that there is more than one answer to this application, but one answer is this. The opening words of sect. 1 of the Act are as follows:

> Where, after the commencement of this Act, a person dies domiciled in England leaving . . . a daughter . . .

That necessitates an applicant proving that the person in question did die domiciled in England. It appears that the mother had married a Russian, but who was no doubt in England at the time of the marriage. The parties separated, and nobody knows whether the husband is still alive, or where he is, or what his domicil is or was at the time before the mother's death. In my judgment, it is an essential ingredient of an application of this sort that the plaintiff should prove that the dead person was domiciled in England at the date of the death. That evidence is not forthcoming. No doubt there is no direct evidence to the contrary, but there is sufficient in this case to make proof of the domicil of the testatrix necessary before the court can give the assistance for which the applicant asks. The evidence leaves the matter completely at large. No doubt the mother lived in England all her life, and it may be that the husband lived in England all his life, and that they were both domiciled in England; but it is not proved, and, in the absence of such evidence, it is not open to me to make any order in the present case. Apart from that altogether, even if it were open to me to make an order in this case, I should not feel inclined to do so. This is a very unusual case, in that, as from the time when the child was 5 years old, although the mother knew about the child and where she was, she seems to have considered that she was under no obligation to make any contribution towards the child's maintenance, and Mrs. Ward, with whom the child was living, seems to have allowed the mother to go on without contributing in any way to the child's maintenance. The daughter herself apparently never made any attempt to obtain any assistance from her mother, and she was content to allow things to proceed on that footing, while the ordinary relationship between mother and daughter never really existed. The mother might well have taken the view, in all the circumstances, that, whatever obligation she may have been under when the child was born and when she was very young, she was afterwards under no obligation to provide for the child, having regard to the fact that the child was living with Mrs. Ward and was quite content with that, and would, or might be, in a position to obtain her own living, although she had this disability.

On the whole, I do not think that this is a case where the court ought to interfere. There is no direct evidence that the mother was domiciled in this country, and that in itself is sufficient, in my view, to disentitle the applicant to relief. Apart from that, this is not one of the cases where I think the court ought to interfere and deprive any of the persons whom the wife has desired to benefit under her will of any part of the provisions made by the will.

Application dismissed with costs.

Solicitors : *H. Roland Thomas* (for the applicant) ; *Douglass & Weaver* (for the respondents).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

Re HURD, STOTT *v.* STOTT.

[Chancery Division (Farwell, J.), **January 22, 1941.**]

Wills—Lapse—Statutory exception from lapse—Beneficiary dying before 1926—*Testatrix dying after* 1925—*Distribution of interest saved from lapse—Wills Act,* 1837 (*c.* 26), *s.* 33.

The testatrix by her will made a specific devise and gave a share of her residuary estate to her daughter. The daughter died in 1923 leaving issue who survived the testatrix, who died in 1939. The gift to the daughter was saved from lapse by the Wills Act, 1837, s. 33, but the question was raised whether those gifts, when being administered as part of the daughter's estate, should be administered according to the law in force at the date of the daughter's death or as amended by the Administration of Estates Act, 1925, which came into force before the death of the testatrix :—

Held : the effect of the Wills Act, 1837, s. 33, was only to avoid the lapse of the daughter's interest under the will, and had no effect upon the administration of the daughter's estate. The gifts saved from lapse should be administered by the personal representative of the daughter according to the law in force before 1926.

[**EDITORIAL NOTE.** The most surprising point in this case is that 15 years have elapsed since the coming into force of the amendment of the law of distribution before this question has arisen for determination. Apart from that it is a question of the construction of the 1837 Act. The point is a difficult and awkward one, but it is decided on the ground that the 1837 Act is confined to the prevention of lapse, and that, therefore, the words " take effect as if the death of such person had happened immediately after the death of the testator " do not refer to or affect any question of distribution.

As to Statutory Exceptions from Lapse, see HALSBURY, Hailsham Edn., Vol. 34, pp. 138-140, paras. 178-181 ; and for Cases, see DIGEST, Vol. 44, pp. 502-506, Nos. 3218-3248.]

Adjourned Summons to determine whether the interest accruing to the estate of the intestate, Sarah Giblett Curry, under the will of the testatrix should be administered according to the law in force before 1926, or in accordance with the provisions of the Administration of Estates Act, 1925. The testatrix, Anna Hurd, made her will on Jan. 30, 1923, and died on Apr. 18, 1939. Probate of the will was granted on July 11, 1939, out of the Gloucester District Registry. By cl. 5 of the will, the testatrix gave all the residue of her property " to my daughter Sarah Giblett Stott and the three younger ones first giving to Sarah any land which belonged to her father." The testatrix was twice married, first to John Stott and then to John Hurd, and there were five children of the first marriage and three of the second. One child of the second marriage predeceased the testatrix, and his share lapsed. The daughter Sarah Giblett Stott also predeceased the testatrix, dying intestate on Sept. 20, 1923, but she left issue, having married Edmund Shingleton Curry, by whom she had three daughters. Letters of administration to the intestate's estate were granted on Feb. 22, 1940, out of the Gloucester District Registry to her husband, Edmund Shingleton Curry, and her daughter, Ann Shingleton Curry.

Raymond W. Jennings for the plaintiff, the executor.

C. R. D. Richmount for all the defendants except the second and last defendants.

J. A. Reid for the last defendant, an infant.

Farwell, J. : The question which I have now to determine is one of very considerable interest, and, if there were nothing else in the summons except this one question, it would more than justify the issue of the summons. It is not by any means easy to arrive at the answer to the question. It arises in this way. The Wills Act, 1837, s. 33, provides as follows :

> Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unlesss a contrary intention shall appear by the will.

The facts are these. The testatrix, Anna Hurd, by her will gave to her daughter Sarah certain lands which had belonged to Sarah's father and a share in the residue That daughter had issue, but died intestate in 1923. The testatrix died on Apr. 18, 1939. Though in fact the gift to Sarah lapsed by reason of her death in the lifetime of the testatrix, sect. 33 A saves the position, and the gift takes effect, because she had issue living at the death of the testatrix, and she must be treated for the purpose of sect. 33 as having died immediately after the death of the testatrix. At the time of Sarah's death the law applicable to the administration of the estates of intestates was the law prior to the Act of 1925. Before the B death of the testatrix, the Administration of Estates Act, 1925, had come into force, and the administration of an intestate's estate had been altered, so that, although, so far as Sarah's own estate went, it would be necessarily administered and divided amongst those persons who were entitled to the estate prior to the Act of 1925, it is said that C the effect of sect. 33 is that, so far as the gift given by Anna Hurd is concerned, that must be administered in accordance with the law since 1925. Moreover, it is said, and said with much force, that that is the effect of the language of sect. 33. The section provides that the gift is not to lapse, but is to take effect as if the death of such person had happened D immediately after the death of the testator. If one treats those words quite literally, one must assume that the lady survived and then died immediately after the death of the testatrix in 1939, and the effect must be that the estate must be administered according to the law in force at that date—namely, at the date when she is deemed to have died. E In my judgment, however, that is not really the true effect of this section. The effect of the section is to prevent lapsing in this particular case, the result being that, instead of the gift lapsing, it becomes part of the estate of the deceased person, and it is provided that the gift is to go on the footing that the lady was alive at the death of the testatrix and was, F therefore, a person to whom the gift could be given. However, although she is deemed, for the purpose of making this gift effective, to have been living in 1939, none the less the gift itself does become a part of the estate of the beneficiary—and, that estate being administered in accordance with the law as it was at the true date of the death, that is the law G under which the share which she takes by virtue of this provision must also be administered. It is not difficult to appreciate what position might arise if that were not the true effect of the section. For instance, if a person dies intestate in the lifetime of the testator and it becomes necessary to inquire who is the next of kin at the date of the death, H and an inquiry is ordered, and the whole matter is gone into and the master's certificate finding who were the next of kin of the deceased person is made. If subsequently that estate becomes increased by a gift which is in favour of a person deemed to have died after 1925, then, if I am to read sect. 33 as meaning that the estate is to be administered in accordance with the law as it was after 1925, a further inquiry will be necessary as to the next of kin of that person, on the footing that she died at a time when, in fact, she had been long dead. The result might be that, in those circumstances, one might have different persons—some going out and others coming in—entitled to participate in any share to which the estate became entitled and which is saved from lapsing by virtue of sect. 33.

On the whole, I have come to the conclusion that this section does not apply beyond providing for the prevention of the lapse. That is to say, it is not intended to do anything more than prevent the gift having no effect at all, with the result that the gift which would otherwise have lapsed passes to the person who is the legal personal representative of the deceased, who takes it as part of the estate of the deceased person. Thus the estate of the person who was entitled under the intestacy of the intestate becomes enriched by this additional legacy. The Act does not, in my judgment, apply so as to alter the way in which the existing estate should be disposed of. It only operates so as to increase that estate, and does not change the persons who were entitled to the estate under the law which was in force at the time of the intestate's death.

Declaration accordingly. Costs (with the exception of one defendant, to whom no costs were allowed) of all parties to be taxed as between solicitor and client and paid as to one half out of the estate of the testatrix and as to the other out of the estate of the intestate.

Solicitors: *Stileman, Neate & Topping*, agents for *Harris & Harris*, Wells (for all parties).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

SMALLMAN *v.* EMBASSY CINEMA (TOTTENHAM COURT ROAD), LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and du Parcq, L.JJ.), **January 27, 1941.**]

Emergency Powers—Contract made before commencement of Act—Building agreement followed by lease—Lease made with company incorporated after commencement of Act—Building agreement made before commencement of Act with promoters of company—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (2) *prov.*

On Feb. 22, 1939, the plaintiff entered into a building agreement with C. and M., who, by the terms of the agreement, undertook to erect a cinema. The agreement provided, *inter alia*, that C. and M. might require the plaintiff to grant a lease to their nominee at any time before the grant of the lease. On Sept. 22, 1939, the defendant company was incorporated, and on Sept. 27, 1939, it was granted a lease as such nominee. The rent having fallen into arrear, the question arose as to whether or not the company was entitled to relief under the Courts (Emergency Powers) Act, 1939 :—

Held : the debt or obligation of the company arose by virtue of the lease, and was a debt or obligation arising out of a contract made after the outbreak of the war. The company were, therefore, not entitled to the relief sought.

[**EDITORIAL NOTE.** The question here is whether the debt arose under the agreement for the lease or under the lease when granted. The matter in this case is much simplified by the fact that the lease was granted to the company and the agreement was made with the promoters of the company. The parties to the agreement were not parties to the action and, therefore, it is clear that the action is founded on the lease and the material date is the execution of the lease. The matter is put beyond dispute by the fact that the company, the lessees under the lease, were not incorporated until after the commencement of the war.

As to Relief under the Courts (Emergency Powers) Acts, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 946-950.]

Case referred to :

(1) *Page* v. *Skelt*, [1940] 2 All E.R. 419 ; Digest Supp.

Interlocutory Appeal by the plaintiff from an order of Stable, J., dated Jan. 2, 1941. The material facts are fully set out in the judgment of Sir Wilfrid Greene, M.R.

Gerald Gardiner for the appellant.

H. Lester for the respondents.

Gardiner : The lease was a post-war lease, and, therefore, the Courts (Emergency Powers) Act, 1939, did not apply. The defendants said that the Act did apply because there was a pre-war contract. The master decided in favour of the plaintiff, on the ground that the rent became due under the lease, and held that, therefore, the Act did not apply. The judge took the view that the rent arose under the building agreement. The defendant company was under no obligation to take the lease, but undertook the obligation after the beginning of the war. In the present case, there was no debt on the outbreak of war. The only document on which the defendant company is liable is the lease. [Counsel referred to *Page* v. *Skelt* (1). He was stopped by the court.]

Lester : The rights and obligations of the parties in respect of this debt arise under the building agreement. It is the contract which creates the rights and the obligations. The plaintiff's right exists under the building agreement. If there had been an assignment of a lease to the defendant company, there could have been no question about the liability. In *Page* v. *Skelt* (1), the question was whether a sum was due under the terms of a settlement of an action or before. The court held that the money was due under the writ and that the debt arose before the date of the Courts (Emergency Powers) Act, 1939.

Sir Wilfrid Greene, M.R. : The only point which arises in this appeal is as to the application of the Courts (Emergency Powers) Act, 1939, to the facts of the present case, which may be shortly stated as follows. On Feb. 28, 1939, the present plaintiff entered into a building agreement with Cohen and Michaels. Under that agreement, Cohen A and Michaels were to erect a cinema in Tottenham Court Road, and by cl. 17 it was provided in the usual way that, when the building was completed, the plaintiff, the lessor, should grant, and the tenants should accept and execute a counterpart of, a lease of the premises and the building for a stated term at a stated rent in the form set out in the B schedule to the agreement. Clause 18 of the agreement provided that the tenants (Cohen and Michaels) might, by notice in writing to the lessor at any time before the grant of the lease, require the lessor to grant the lease to a nominee or nominees of the tenants, including a limited liability company, and that the lessor should accordingly grant the lease to such C nominee or nominees. That contract, of course, was a pre-war contract, and, unless a nominee was provided, Cohen and Michaels would have been compelled to accept the lease themselves.

What happened in fact was this. On Sept. 22, 1939, the defendants, the respondents to this appeal, were incorporated under the D Companies Act, 1929, and on Sept. 27, 1939, the lease contemplated by the building agreement was granted to the defendants. That was in pursuance of a nomination under cl. 18 of the building agreement, which, of course, was necessary, and the acceptance by the defendants of the lease was the acceptance of that nomination. It is perfectly clear that E the defendants were under no contractual obligation whatsoever until that lease was executed. Unless and until the contemplated lease was taken by a nominee of Cohen and Michaels, who were parties to the agreement, Cohen and Michaels alone were under liability to the plaintiff. In order that the defendants might become liable, three elements were F necessary—namely (i) the original building agreement, which was a pre-war agreement, (ii) the nomination under cl. 18, which, we were told, was in fact made before the company was actually incorporated on Sept. 22, 1939, and before the war, but could become effective only when the defendants were incorporated and accepted the lease, and (iii) the G taking of the lease by the defendants. Accordingly, the last of those three elements took place after the beginning of the war. In these circumstances, the question is whether or not the defendants are entitled to claim relief under the Courts (Emergency Powers) Act, 1939. The relevant words are to be found in the proviso to sect. 1 (2) of the Act, H the material part of which is in the following words :

> Provided that this subsection shall not apply to any remedy or proceedings available in consequence of any default in the payment of a debt, or the performance of an obligation, being a debt or obligation arising by virtue of a contract made after the commencement of this Act. . . .

The debt or obligation of this company arose by virtue of the lease and nothing else, because, before they executed that lease, they were under no obligation to anybody. The fact that the lease historically, so far as they are concerned, originated in the building agreement to which they were not parties, is quite irrelevant, in my judgment. Historically, of course, that is true, but the question which we have to consider in interpretating this proviso and applying it to the facts is whether or not the debt or obligation which it is sought to enforce arose *qua* the person A against whom it is sought to enforce it by virtue of a contract made after the commencement of this Act. In the present case, it seems to me that there is only one answer to that question. These defendants being under no pre-war obligation—or, indeed, any obligation—to do so, chose after the beginning of the war to assume the obligations contained B in the lease. They were not in any way bound to do it. It was a matter of free choice on their part. Had the lease been granted to the original lessees, of course, that argument would not have applied, and very different considerations might have had to be taken into account, because the original lessees were under a contractual obligation C to take the lease. However, there is all the difference between that case and this, because here the obligation which it is now sought to enforce on these defendants came into existence for the first time when the lease was granted. In the result, this appeal succeeds.

D

MACKINNON, L.J.: I agree.

DU PARCQ, L.J.: I agree.

Appeal allowed with costs.

Solicitors: *Wilkinson, Bowen, Haslip & Jackson* (for the appellant); E *Syrett & Sons* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

SLATER *v.* WORTHINGTON'S CASH STORES (1930), LTD.

[KING'S BENCH DIVISION, LEICESTER AUTUMN ASSIZES (Oliver, J.), **January 24, 1941.**]

Highways—Nuisance—Fall of snow from building—Act of God.

Nuisance—Public nuisance—Building adjoining highway—Fall of snow from roof—Act of God.

During Jan. 1940, extraordinarily severe snowstorms, reaching their peak on Jan. 29, had caused snow and ice to accumulate on the roof of the defendants' leasehold premises in Leicester. No steps were taken to remove this snow or to warn the public of its presence. On Feb. 2, the plaintiff was standing on the highway outside these premises when she was injured by a fall of snow. She claimed damages, alleging nuisance, or, alternatively, negligence. The defendants denied these allegations, and pleaded in defence that these severe snowstorms were an act of God :—

HELD : (i) this accumulation of snow constituted a public nuisance, of which, in view of the severity of the storms, the defendants must be deemed to have had knowledge. Since a period of four days had elapsed during which this could have been abated, and nothing was done, the defendants were liable both in nuisance and in negligence.

(ii) the plea that the storms were an act of God was no defence in this case, as it was the snow, and not the storms, which directly caused the injury.

[**EDITORIAL NOTE.** The Court of Appeal in *Sedleigh-Denfield* v. *St. Joseph's Missions* [1939] 1 All E.R. 725 ; Digest Supp. stated that it was not the duty of an occupier to go about his land searching for nuisances which might or might not exist. The House of Lords reversed that decision and stated that an occupier was liable if, with knowledge or means of knowledge, he suffered a nuisance to continue. There can be no doubt here that the occupier had knowledge of the nuisance, and, once it is found that an accumulation of snow on the roof liable to fall on the highway is a nuisance, it seems clear that the occupier must be liable. There is, therefore, a duty upon an occupier of a house adjoining a highway to remove snow from the roof, a point which does not seem to have arisen before.

AS TO COMMON LAW NUISANCES IN RESPECT OF HIGHWAYS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 354-363, paras. 483-485 ; and FOR CASES, see DIGEST, Vol. 26, p. 439, Nos. 1559-1563.]

Cases referred to :

(1) *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L.T. 1 ; Digest Supp.

(2) *Wringe* v. *Cohen*, [1940] 1 K.B. 229 ; [1939] 4 All E.R. 241 ; Digest Supp. ; 109 L.J.K.B. 227 ; 161 L.T. 366.

(3) *Barker* v. *Herbert*, [1911] 2 K.B. 633 ; 36 Digest 197, *374* ; 80 L.J.K.B. 1329 ; 105 L.T. 349.

(4) *Nichols* v. *Marsland* (1876), 2 Ex.D. 1 ; 36 Digest 104, *695* ; 46 L.J.Q.B. 174 ; 35 L.T. 725.

(5) *Greenock Corporation* v. *Caledonian Railway Co.*, *Greenock Corporation* v. *Glasgow and South Western Railway Co.*, [1917] A.C. 556 ; 36 Digest 104, *700* ; 86 L.J.P.C. 185 ; 117 L.T. 483.

ACTION for damages for injuries sustained by the plaintiff when snow fell on her from the roof of the defendants' premises. The facts are fully set out in the judgment.

R. J. White (for *E. M. Ling Mallison* on war service) for the plaintiff.
A. S. Ward and *P. S. Pitt* for the defendants.

Oliver, J.: On Friday, Feb. 2, 1940, the plaintiff, Dorothy May Slater, was injured by a mass of snow which fell upon her from the sloping roof of the defendants' leasehold premises in Leicester, and she has brought this action for damages, alleging nuisance, or, alternatively, negligence.

There was no very serious dispute as to the facts. On the afternoon in question, the plaintiff was out shopping with her mother in Northgate, Leicester. The mother went into the defendants' shop to make a purchase and the plaintiff remained on the pavement outside, looking into the window. Suddenly a large mass of snow, together with three lengths of iron guttering, fell from the roof of the defendants' premises. Fortunately, the guttering did not strike the plaintiff, or she would probably have been killed. She was crushed under the weight of the falling snow, and sustained severe injuries, including the fracture of one of the vertebrae about the middle of her back. The roof and the guttering were, for all ordinary purposes, in perfect repair and condition, having been overhauled as recently as May, 1939. The accumulation of snow on the roof immediately before the accident was to a depth of approximately 1 ft. 6 ins. It was the result of a series of snowstorms, described as some of the worst within living memory in the Midlands, and which had lasted, with intervals, from Jan. 26, 1940 until Jan. 29, 1940. The accumulation of snow on the roofs of the houses—and, indeed, everywhere else—was rendered more difficult to handle by reason of the fact that, during the storms, there were alternate periods of frost and thaw, which produced layers of ice in the final mass of snow.

I am satisfied, however, that it was physically quite possible to have removed the snow from the defendants' roof at any time after Jan. 29, which was 4 days before the accident. The evidence established to my satisfaction that Jan. 29 was the peak day and that thereafter the snow got gradually a little less until the accident.

The actual cause of the fall was no doubt a fairly heavy thaw which set in about midday on Feb. 2. It is quite clear (i) that between Jan. 29 and Feb. 2 no step was taken by the defendants to remove the snow; (ii) that no warning was given to the plaintiff and others using the street; and (iii) that no step was taken by the defendants to prevent the public from walking or standing under the roof in question. The premises were occupied by the defendants under a lease containing a covenant by the landlord, *inter alia*, to keep:

> . . . the walls and roofs and all other outside parts of the premises . . . in good repair and condition.

Counsel for the defendants contended, first, that the covenant to repair by the landlord absolved the defendants from liability to the plaintiff, secondly, that there was no evidence of nuisance, or, thirdly, that there was no evidence of negligence. With regard to the first point, I do not think that the covenant affects the question of liability at all. In the first place, even if the guttering had been out of repair (and I have already said that it was not), it was not the guttering, but the snow, A which injured the plaintiff. Therefore, this is not a case of non-repair at all. However, in cases of nuisance and negligence in connection with buildings, it is the occupier who is always liable. The owner is liable only in certain circumstances, which do not arise here, although, of course, the terms of the contract might involve a remedy over against B him by the tenant: BEVEN ON NEGLIGENCE, 4th Edn., p. 524, and also the judgment of SCRUTTON, L.J., in *St. Anne's Well Brewery Co.* v. *Roberts* (1). That was a nuisance case, where a wall had fallen upon the plaintiffs' premises from neighbouring premises and damaged the plaintiffs' building. SCRUTTON, L.J., said, at p. 7:

> C I think also it is clear law that the person liable for a nuisance on premises is certainly the occupier.

No one, I think, could successfully contend that, because the landlord was liable to effect the outside repairs to a house, the tenant in occupation of the premises had no right to remove snow from the roof.

D I proceed next to consider the question of nuisance. Apart from the cases arising from non-repair of premises (as to which, see *Wringe* v. *Cohen* (2)), I think that it is plain that an occupier is not liable for nuisance on his premises, unless either he created the nuisance, or, knowing of its existence, or being in a position where, with reasonable E care, he would have known of its existence, he has done nothing to remedy it: *Barker* v. *Herbert* (3), the judgment of SCRUTTON, L.J., in *St. Anne's Well Brewery Co.* v. *Roberts* (1), and SALMOND ON TORTS, 9th Edn., p. 245. I have first to consider whether or not the accumulation of snow in this case on the defendants' roof overhanging the street F was a nuisance. I am clearly of opinion that it was. A great mass of snow 18 ins. thick on a sloping roof overhanging a public street in a great city, and liable to fall at any time upon the heads of persons lawfully using the street below, must surely amount to a nuisance, and to a public nuisance at that.

G Therefore, I have to apply the law as I understand it to this finding. In this case, it is obvious, of course, that the nuisance was not created by the defendants. It was created by the operation of nature, and, if, during the course of this great blizzard, and before there had been any reasonable opportunity of removing it, the snow had fallen and H injured the plaintiff, I would have found for the defendants. However, this was not the case. Four days elapsed between the creation of the nuisance and the accident. It would be obvious to anyone who thought about it that there probably would be a great accumulation of snow overhanging the street on all roofs such as the one in question. That the defendants knew it was made clear from the answers to interrogatories, wherein, moreover, it was sworn that no steps were taken to remedy the matter, as none was necessary. Accordingly, I find that the defendants, having knowledge of a public nuisance on their premises, did nothing to abate it, and, therefore, they are liable in law for the damage which it occasioned to the plaintiff.

If this view is right, the question of liability on the ground of negligence becomes academic. However, in view of the possibility of an appeal, I feel that I should state my opinion about that. On the facts of this case, I think that there was a duty on the part of the defendants to safeguard members of the public using the street from the danger occasioned by the snow, either by removing it or by adopting some other effective means, such as a warning. They did nothing at all. I accordingly find against them on the ground of negligence also. In deference to part of the argument of counsel for the defendants, I ought to say a word about act of God. Counsel for the defendants contended that the storms in question were of such unprecedented violence as to fall within the ambit of the doctrine of act of God, exemplified in *Nichols* v. *Marsland* (4). It must always be remembered that in that case there was a finding by the jury of act of God. This doctrine is known as *damnum fatale* in Scotland, and, as far as I am aware, there is no difference in the law applicable in the two countries. I can only say that, after studying *Greenock Corpn.* v. *Caledonian Ry. Co.* (5), I should have hesitated long before saying that the storms in question, even had they directly caused the mischief, were such as to fall within the doctrine. I do not think that I have to decide this at all. It was not the storms which directly caused the injury to the plaintiff. It was the fact that the accumulation of snow had not been removed by the defendants as it should have been.

Judgment for the plaintiff with costs.

Solicitors: *H. W. Clarkson, Wright & Co.*, agents for *Herbert Simpson, Son & Bennett*, Leicester (for the plaintiff); *Nash, Field & Co.*, agents for *Blewitt & Co.*, Birmingham (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

MANLEY ESTATES, LTD. *v.* BENEDEK.

[Court of Appeal (MacKinnon and du Parcq, L.JJ.), **January 27, 1941.**]

Practice—Conditional leave to defend after judgment entered—Condition not fulfilled within time specified—Application to extend time—R.S.C., Ord. 64, r. 7.

Judgment in default of appearance was obtained against the defendant. The defendant later stated that he had a defence to the action, and leave was then given to defend, provided certain conditions were complied with within 7 days. After that time had elapsed, the defendant applied for an extension of time:—

HELD: the court or a judge had power under R.S.C., Ord. 67, *r.* 7, to enlarge the time since the action was still in existence.

[**EDITORIAL NOTE.** It was argued in this case that the leave to defend was conditional upon payment being made within 7 days, and that, when the payment was not made within that time, the action had come to an end, because the condition upon which the defendant was allowed to continue it had not been fulfilled. This, however, is not the true view of the position. The action, in such circumstances, is still in existence and an application can be made for further time.

AS TO EXTENSION OF TIME, see HALSBURY, Hailsham Edn., Vol. 19, p. 212, para. 510; and FOR CASES, see DIGEST, Practice, pp. 843-845, Nos. 3904-3926. See also THE YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 1400-1402.]

Cases referred to:

(1) *Script Phonography Co.* v. *Gregg* (1890), 59 L.J.Ch. 406; Digest, Pleading, 133, *1210*.

(2) *Whistler* v. *Hancock* (1878), 3 Q.B.D. 83; Digest, Pleading, 133, *1209*; 47 L.J.Q.B. 152; 37 L.T. 639.

(3) *Carter* v. *Stubbs* (1880), 6 Q.B.D. 116; Digest, Practice, 705, *2999*; 50 L.J.Q.B. 161; 43 L.T. 746.

(4) *Re Pilcher, Pilcher* v. *Hinds* (1879), 11 Ch.D. 905; Digest, Practice, 845, *3920*; 48 L.J. Ch. 587; 40 L.T. 832.

APPEAL by the defendant from an order of STABLE, J., dated Jan. 2, 1941, on appeal by the defendant from an order of Master MOSELEY, dated Dec. 30, 1940. The action was on a moneylender's debt, and judgment was obtained by the plaintiff company in default of appearance. Bankruptcy proceedings subsequently followed, and the material disclosed before the registrar revealed such circumstances that he adjourned the proceedings to enable the debtor to take proceedings to set aside the judgment. The defendant subsequently took those proceedings and was given leave to defend on condition that he entered an appearance within 7 days and that he paid into court a sum of £50. The defendant was also ordered to pay the costs of the bankruptcy proceedings. The defendant appealed to WROTTESLEY, J., against that part of the order which required him to pay the costs of the proceedings in bankruptcy. The appeal was allowed to that extent, and it was ordered that the costs should be reserved to the trial judge. WROTTESLEY, J., took the view that no condition should have been attached to the order. However, he said that the time for paying the £50 into court should be extended by 7 days. That time expired and an application was made to Master MOSELEY for an extension of time. On behalf of the plaintiffs, it was contended that there was no jurisdiction in the master to extend the time fixed by a judge in chambers, and Master MOSELEY dismissed the application. The defendant appealed to the judge in chambers, but STABLE, J., dismissed the appeal on the ground that there was no jurisdiction, as it was part of the order of Master BALL, when giving leave to defend, either that the condition should be complied with or else that the judgment should stand.

G. Granville Sharp for the appellant.

W. A. L. Raeburn for the respondents.

Sharp : R.S.C., Ord. 64, r. 7, provides that the court shall have power to extend or abridge the time appointed by the rules upon such terms as the justice of the case may require, and that any enlargement of the time may be ordered although the application is not made until the time allowed has expired. The point is a purely technical one. It was contended before Stable, J., on behalf of the respondent that R.S.C., Ord. 64, r. 7, did not apply in the present case, because the order put an end to the action when the 7 days had expired. That contention was based on cases in which the action had been dismissed for want of prosecution. In *Script Phonography Co.* v. *Gregg* (1), an order was made in chambers dismissing the action unless the plaintiff took the next step within a specified time. It was held that, if he failed to do so, or if he failed to appeal, the time could not be extended, for the period ordered had elapsed. In *Whistler* v. *Hancock* (2), the plaintiff was ordered to deliver a statement of claim within 7 days. It was not delivered, and it was held that there was no jurisdiction to extend the time, because the action was at an end. In the present case, however, there was a judgment which was capable of being dealt with. All the authorities cited presupposed that an end had been put to the action. In the present case, however, the action had not been put to an end, because the judgment had been allowed to stand. [Counsel referred to *Carter* v. *Stubbs* (3).]

Raeburn : The writ was issued on June 24, 1940, and on Sept. 20, 1940, there was judgment in default of appearance. A bankruptcy petition was presented on Nov. 9, 1940, and the petition was disputed on the ground that the debtor had what he called a defence to the action. The only matter, however, was a personal claim against a director of the company. That is neither a defence nor a counter-claim. The alleged defence upon which the defendant relies does not arise under the Moneylenders Act, 1927, at all. The only defence alleged is not one which can be pleaded in the action. The master put the defendant upon strict terms. The material term was that £50 had to be brought into court within 7 days. That was a condition precedent to the judgment being re-opened. The judgment was regular, and it could not be set aside unless the condition was fulfilled. R.S.C., Ord. 64, r. 7, does not apply to a case of this kind, because this is not an application for extension of the time appointed by the rule. In the first place, one looks at the time appointed by the rule. That may be enlarged by the court or by a judge. In the present case, however, the time is a condition. If the condition is not complied with, the order does not take effect at all. The court can always vary a condition, so long as the condition is there to be varied. However, when the condition has taken effect and the order has come into force, it is as though the action has been dismissed for want of prosecution. The order of Master Ball was not an order fixing a time, or enlarging the time, within the meaning of the rules. [Counsel referred to *Re Pilcher, Pilcher* v. *Hinds* (4).]

MacKinnon, L.J. : I think that this appeal succeeds. It is a very short point. There was judgment in default of appearance on Sept. 26.
A The defendant applied to Master Ball on Dec. 2 to set aside that judgment. Master Ball made an order that it should be set aside provided that certain costs were paid and that £50 was paid into court within 7 days. There was an appeal from that order to Wrottesley, J., but for some obscure reason it was only an appeal as regards the costs in
B bankruptcy, and nothing was said about the order to pay money into court. Wrottesley, J., was told, and agreed, that unfortunately he could not set aside the order about payment in, because there was no appeal about that part of the order. He set aside the part about paying costs and gave 7 days further time for paying the money into court.
C The defendant failed to make the payment in within the extended time, and then on Dec. 30 he applied to Master Moseley for a further 7 days' time. The point was taken before Master Moseley that he had no jurisdiction to make any such order extending the time. There was an appeal to Stable, J., on that point, and on that point only, and he
D agreed with the master that he had no such power. I think, with all respect to them, that they were both wrong, because R.S.C., Ord 64, r. 7, provides as follows :

> A court or a judge [which includes, therefore, a master] has power to enlarge any time fixed by these rules, although the application for the same is not made until after the expiration of the time appointed or allowed.

E I think that one would be deleting those words " although the application for the same is not made until after the expiration of the time " from the rule altogether if this suggested point were a good one. Counsel for the respondents relies, and there was reliance below, on cases of a totally different nature, where, after an action was dismissed—and,
F therefore, judgment entered for the defendant—it was held that the plaintiff could not make an application to enlarge the time in that action, as the action had disappeared. Here, the action has not disappeared. It is in existence, and there is actually a judgment which has not been prosecuted to execution. I think that, within the words of that rule,
G there was jurisdiction in the master to enlarge the time. In the result, I think that this appeal should be allowed, and that the order asked for from Master Moseley should be made. That is to say, the original order of Master Ball should stand, with the exception of the condition about paying the bankruptcy costs, but preserving the condition about paying
H the £50 into court, such payment to be made within 7 days from to-day.

du Parcq, L.J. : I agree.

Appeal allowed with costs in both courts.

Solicitors : *Oscar Mason & Co.* (for the appellant) ; *Isadore Goldman & Son* (for the respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

GIBSON *v.* NORFOLK COUNTY COUNCIL.

[King's Bench Division (Humphreys and Oliver, JJ.), **January 15, 16, 1941.**]

Town and Country Planning—Development restricted by statute—Ribbon development—Compensation for injury to estate or interest—Assessment of compensation—Decrease in market value—Expense of release from onerous agreement—Restriction of Ribbon Development Act, 1935 (*c.* 47), *s.* 9 (1) (4).

The applicant entered into a building agreement whereby he agreed to build four houses on a plot of land abutting on a trunk road. Under the agreement he would become entitled to leases of the 4 houses for a term of 99 years. The purchase was made in 1936. He applied under the Restriction of Ribbon Development Act, 1935, for permission to build 4 houses on the land with access from them to the road. This was refused, but the building would have been permitted if he had undertaken at his own expense to construct a service road parallel to the trunk road at a cost of £240. He then applied for compensation under the Act. The arbitrator found that the original market value of his interest in the land was £20, and that, if he wished to assign the building agreement, he would have to pay the assignee £240 to induce him to take it over. The arbitrator thereupon stated a special case asking the court whether the proper assessment of compensation under the Act was the sum of £20 or a sum of £260, made up of £20, the market value of the applicant's interest in the land, and the £240 which he would have to pay to avoid his obligations under the building agreement :—

Held : in assessing the compensation, the arbitrator had, under the Act, to take the original market value of the interest of the claimant and ascertain by what amount it had been diminished by the action of the restricting authority. Upon this basis the compensation could not be greater than the original market value of the land. The proper amount of the compensation in this case was £20.

[EDITORIAL NOTE. An attempt was made in this case to recover compensation not only for the decrease in the market value of the property, but also in respect of the amount which the applicant would have to pay to obtain his release from what had become an onerous agreement. The question, however, is not what the applicant has lost as a matter of accountancy, but what is the proper amount of compensation he is entitled to which under the Act when it is properly construed. The court have found no difficulty in reaching a decision in favour of the lower figure, and, indeed, any other decision would have given considerable encouragement to those who speculate in building land.

As to Compensation under the Ribbon Development Act, see HALSBURY, Hailsham Edn., Vol. 32, pp. 290-292, paras. 474-477 ; and for Case, see DIGEST, Supp. Highways, No. 645a.]

Special Case stated for the decision of the court under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1). The facts are fully set out in the judgment of Humphreys, J.

A. G. N. Cross for the claimant.

C. Erskine Simes for the respondents.

Humphreys, J. : The claimant is stated in the case to be a builder who, on Sept. 11, 1936, entered into a building agreement in regard to certain land. The building agreement provided for his being a tenant at will for a time, and provided also for the grant of leases for 4 houses to be built upon the piece of land of which he was for the time being the tenant at will. The leases were to be for a term of 99 years from Sept., 1934, at an annual ground rent for each house of £3 15*s*., making a total ground rent for the whole plot of £15 per annum. The plot of land abutted directly on a trunk road, and was subject to the Restriction of Ribbon A Development Act, 1935. Sect. 2 (1) of that Act provides, *inter alia*, as respects all roads of a certain kind :

> . . . the following restrictions shall be in force on and after the date of the passing of this Act, that is to say, it shall not be lawful, without the consent of the highway authority [otherwise known as the restricting authority] (*a*) to construct, form or lay out, any means of access [from such houses to the road, or from the road to the houses, or] (*b*) to erect or make any building upon land within 220 ft. from the middle B of the road.

Such a restriction obviously made at once a considerable alteration both in the development value of the plot of land in question and in the interest in the plot of land in question, which was owned by the claimant. There is power in the restricting authority to waive the C conditions of the statute in a proper case, and the claimant duly applied to the restricting authority for consent, and asked for permission to erect 4 houses or bungalows and to allow access from them to the road. That application was refused, except subject to certain onerous terms. Negotiations proceeded, with the result that the claimant was unable to D obtain the permission of the restricting authority (partly having regard to the position taken up by his freeholders) to any plan which would assist him, except that he obtained an undertaking that he might build his houses if he provided access to them, not from the main road, but from a service road which would probably run parallel to the main road, and E which was to be constructed at his own expense. In effect, he would have to add to the expense of building those houses the cost of making the service road.

That being so, the claimant took the appropriate steps to obtain compensation, because compensation is provided for by the Act of F Parliament in such a case. That compensation, by the terms of the Act of Parliament, is to be decided by an official arbitrator, and the official arbitrator in this case decided the matters except one question of law. The arbitrator tells us in one of the paragraphs containing his statement of findings of fact that it was agreed between the parties :

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> . . . that the sum of £20 represented the market value of the claimant's interest in the said land [without taking into consideration any question of ribbon development or any restriction] subject to the payment of the ground rent and other obligations under the said building agreement.

The arbitrator also had to consider what would be the effect on the H claimant's interest in the land, if he had to pay the cost of the houses plus the cost of the service road which he would have to construct in order to give access to the houses from some highway, without which they would be useless. He considered that matter, and came to the conclusion, as he states in his award, that, if the claimant desired to assign his building agreement, he would not only have been unable to get any money from the assignee, but would have to pay him something like £240 to take it over. Thus his interest in the land, which, but for the restriction, would have figured as an asset in his balance sheet to the extent of £20, had now become a liability, and would figure on the other side of his balance sheet as a liability to the extent, probably, of £240.

A Those are the facts which are found by the arbitrator, and they are binding upon us so far as the facts and figures are concerned. The question which the arbitrator has asked us to decide is as follows:

> Whether the compensation payable in respect of the injurious affection of the claimant's interest in the said land caused by the imposition of restrictions under the Restriction of Ribbon Development Act, 1935, can in law exceed the market value of his interest prior to the imposition of the said restrictions calculated subject to B the ground-rent and other obligations [of the lease].

The arbitrator has said: "If the answer to that question is in the affirmative"—that is to say, that the amount of compensation may be greater than the value of the land before the restrictions were imposed—"I award £260." How he arrives at that sum is not stated, but I think C I am right in saying (and I think counsel are in agreement with me in this) that probably it is reached by taking the £20 which he had lost, according to the arbitrator's view, as the value of that which he had before the restriction and adding to that the £240 which he would probably have to pay to an assignee of the building agreement. Then the arbitrator D says: "If, on the other hand, I am confined, in awarding compensation, to the market value of the interest in the land before the restrictions, and I cannot increase that sum in any way, then I give a sum of £20." Thus, it is a question of deciding between £20 and £260.

E Speaking for myself, when I am told that compensation is payable, and when I look at the Act of Parliament and find that the compensation is stated to be payable in the terms which I shall read in a moment, I come to the conclusion that, if the matter stands there, compensation probably means the full compensation. The relevant provision is the Restriction of Ribbon Development Act, 1935, s. 9 (1), which provides F as follows:

> Subject to the provisions of this section, if any person having any estate or interest in land, which includes any piece of land subject to restrictions in force under sect. 1 or sect. 2 of this Act, proves that his estate or interest is injuriously affected by the restrictions, he shall be entitled to recover from the highway authority compensation for the injury to that estate or interest. . . .

G If the matter stood there, and if there were no other sections in the Act dealing with the matter, I should certainly not be surprised at any arbitrator taking the view which I have already stated. It is the view which any ordinary valuer would take. I should not be surprised, H certainly, if a valuer said (as I think is said by the official arbitrator in one of his propositions, he himself expressing no opinion about which is right) that, where one has an interest in land which is worth £20, and the Act of Parliament and the highway authority say, "We are going to turn that asset of £20 into a liability of £240," the compensation payable in respect of that injurious affection ought to be £20 plus £240—namely, £260. However, that is assuming that this Act of Parliament, or any other Act of Parliament, gives no direction at all as to how the compensation is to be calculated.

> "Subject to the provisions of this section" compensation will be paid, and so forth.

However, subsect. 4 of this section defines the way in which the compensation is to be calculated, and is, therefore, binding upon us, whether or not we think it right. Subsect. (4) provides as follows:

> In awarding compensation under this section in respect of any estate or interest in land, the compensation shall, subject to the provisions of this section, be a sum equal to the difference between the market value of the estate or interest when the piece of land is subject to the restrictions and what would have been the market value of that estate or interest if the piece of land had not been so subject. . . .

Those words are particularly clear and free from ambiguity. It seems to me that the Act of Parliament has laid down in plain terms that all the arbitrator has to do is to say: "Here is a piece of land which has been injuriously affected. What was its value before the injurious affection? What is its market value afterwards?" That is all he has to do. If there is a difference between those two things (and, of course, a difference against the claimant, because otherwise there would be no injurious affection), then he is to award that sum. The arbitrator here has given us these figures. He says: "The market value of this interest in land was £20, and, as a result of the action of the restricting authority, it has become worth nothing at all."

The argument of counsel for the claimant is that the arbitrator ought to say, and the court ought to tell the arbitrator that in law he is bound to say, on his findings of fact, that the market value of this interest in land owned by the claimant is minus £260. If that is what Parliament intended in such a case, all I can say is that they have used most peculiarly unfortunate language to indicate their intention. It is conceded—as, indeed, it is bound to be—by counsel for the claimant that no ordinary person using ordinary language would say that a liability had a market value of minus something. That is not the meaning of the phrase "market value" at all. The phrase "market value" assumes that the thing which has the market value is something which somebody will buy. It may be that a buyer will pay very little for it, or it may be that he will pay a great deal for it. It is assumed that there is a market in which that thing can be sold, and that there are persons who, it may be assumed, will pay something for it, and what they will pay for it on the average is what would be the market value. As a matter of ordinary English, I must confess that I have never before heard of the suggestion that one can describe something which has no value at all—and which nobody will have, because it will cost them money if they take it—as having a market value of minus a certain sum of money. Let me take this very simple case. A horse has a market value, it may be said, of £20. That is what it will fetch at the fair. The horse is killed. Its carcase has a market value, which is very different from that of the horse when it was alive, but still, the knackers will give something for the hide and the hooves, and probably the zoological gardens will give something for the rest of the animal. There is market value, and any knacker could say what he would pay for the horse. However, if the carcase of a horse is allowed to remain in the field until it becomes a nuisance, so that the owner of it, who is bound to abate the nuisance, has to pay £1 to the local authority to carry it away and put it in a pit somewhere, or destroy it in an incinerator, would anybody describe that carcase as having any market value ? Would any English person speaking English say that the market value of that stinking carcase is minus a pound ? To my mind, it is a misuse of the English language.

The only conclusion at which I can arrive is that the legislature, in inserting subsect. (4) in this section, intended the consequences which must follow if they have said what they meant—namely, that one should take the market value of the interest (which in this case may be very different from the market value of the land in the hands of somebody else under other conditions) of this particular claimant. If, as a result of the action of the local authority, that market value has been diminished, he is to have that amount by which it is diminished. However, when one gets a case where the diminished value arrived at is zero, so that the interest has no market value at all, I think that it would be doing that which judges might like to be able to do, but which must not be done—namely, giving a decision which comes from the heart rather than from the head—to say : "This claimant has been badly treated, and, in point of fact, as a result of the action of the local authority, he has been found to have made an extremely bad bargain here, because he has entered into a building agreement in regard to which, as his freeholders will not release him, he will probably have to pay somebody £240 to take it off his hands." In the alternative, he can make the service road at a cost of £240 to himself. In that case, on the finding of the arbitrator, he will probably lose money under this building contract, instead of making any little profit he might otherwise have made.

The only other observation which I think it is necessary to make is this. Sect. 9 (1) provides that, in default of agreement, the compensation shall be determined by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919. It is not uninteresting to turn to that Act, as counsel for the respondents invited us to do, to see what is said about assessing compensation under that Act. Sect. 2 provides as follows :

> In assessing compensation, an official arbitrator shall act in accordance with the following rules . . . (2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise. . . .

That is the same conception as that which one gets by the use of the words "market value." One assumes a sale. One assumes something in the nature of a market where there are people who will buy. I think that that does put another nail, if I may use the expression, in the coffin of the arguments of counsel for the claimant. For these reasons, I think that the decision of this court should be that the answer to the arbitrator's question is in the negative.

OLIVER, J.: I am so fully in agreement with every word which has just fallen from HUMPHREYS, J., in the judgment which he has just delivered, that it would be a waste of time to review this matter further. Every point in the case has been fully covered, and I do not propose to say anything more about it except that, in spite of the cautions we have heard about the unwisdom of expressing views about the general objects of a statute, I find myself compelled to say that this building contract was entered into with full knowledge of the existence of the Restriction of Ribbon Development Act, 1935, with full knowledge of the onerous conditions, and with full means of knowledge that these onerous conditions might include the provision of a roadway of this kind. In those circumstances, the claimant made a bargain which he now finds to be a very bad one, and he seeks to get compensation from public funds because he has made a bad bargain. Land speculators, like other people, often make bad bargains, and I cannot contemplate that there could be any idea (and I am now speaking only for myself) that public funds should be at the mercy of the vagaries of speculators of this kind. Therefore, I think that he has to take the position as it is. I should require very clear language in the Act before I could come to any other conclusion. As I have already said, I am so fully in agreement with what HUMPHREYS, J., has said about this Act that I think that it is really unnecessary for me to add anything to it.

Question answered in the negative.

Solicitors: *McKenna & Co.*, agents for *Hatch & Hatch*, Norwich (for the claimant); *Sharpe, Pritchard & Co.*, agents for *H. Christopher Davies*, Clerk to Norfolk County Council (for the defendants).

[*Reported by* A. J. SMITH, ESQ., *Barrister-at-Law.*]

STOCKHOLMS ENSKILDA BANK AKTIEBOLAG *v.* SCHERING, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and du Parcq, L.JJ.), **January 28, 29, 1941.**]

Aliens—Trading with the enemy—Guarantee by English company of debt due to neutral by German company—Whether payment under guarantee for benefit or in discharge of obligation of enemy—Trading with the Enemy Act, 1939 (*c.* 89), *s.* 1 (2) (*a*).

Emergency Legislation—Trading with the enemy—Guarantee by English company of debt due to neutral by German company—Whether payment under guarantee for benefit or in discharge of obligation of enemy Trading with the Enemy Act, 1939 (*c.* 89), *s.* 1 (2) (*a*).

The appellants, a Swedish bank, owned reichsmarks to the value of £84,000, and a German company acquired them for £50,400. Payment of that sum was to be made in sterling on certain agreed terms. Foreign exchange difficulties rendered it necessary to introduce into the transaction an English company (the present respondents) and an Indian company, both of them subsidiaries of the German company. The contract sued upon was dated Apr. 16, 1940, and was made between the appellants and the English and Indian companies. A document, dated Feb. 24 and Feb, 28, 1940, and made between the appellants and the respondents, together with the English and Indian companies as sureties, described the contract as one of debt. The appellants thereby agreed to place the reichsmarks at the disposal of the German company, who were declared to be debtors in the sum of £50,400, free of interest. The debt was to be repaid in sterling at the end of 8 years unless German foreign exchange enactments prevented it. By cl. 3 of the agreement, the English and Indian companies became sureties jointly and severally liable as principals to the amount of £50,400. Clause 4 provided that sterling necessary for repayment of the loan should be provided by the English and Indian companies, or one of them, and that the sureties were to acquire from the appellants their claim against the German company by instalments. If the English and Indian companies made default in acquiring an instalment of the debt on the due date, the German company would lose the benefit of a proportionate part of the discount. A document dated Apr. 16, 1940, provided that, in consideration of the appellants making an advance of £84,000 sterling, to be available in sperrmarks to the German company, the English and Indian companies guaranteed the payment in sterling of the sum of £50,400. The English and Indian companies also made themselves liable as principals. The action was brought by reason of default being made in the payment of an instalment of £3,360. The respondents contended that the German company was an enemy within the meaning of the Trading with the Enemy Act, 1939, and that, if they paid the appellants, they would be guilty of the offence of trading with the enemy within the meaning of the Trading with the Enemy Act, 1939, s. 1 :—

Held : (i) the payment of the instalment claimed would be for the benefit of the German company, since by such payment the German company would be relieved of its obligation to the appellants *pro tanto*. The case therefore fell within sect. 1 (2) (*a*) of the Act, and also within the words "paid . . . money to or for the benefit of an enemy" in para. (*a*) (ii).

(ii) in the circumstances of this case, the action must be dismissed, and it was not the proper course to give judgment with a stay of execution or to make a declaration.

[**EDITORIAL NOTE.** The Trading with the Enemy Act, 1939, prevents any operation which will be a benefit to the enemy. The question here is what limitation is to be put upon the word "benefit." The simplest case is, of course, a direct payment to an enemy subject or company. In the present case there was not to be a direct payment, but a payment by a surety which would release the enemy subject, that is, the principal debtor, from his liability. There was also a benefit as the payment would stop the running of interest. It is held that both these matters are a benefit within the meaning of the Act. There is a further discussion as to when the proper relief is a declaration or judgment accompanied by a stay and when the action should be wholly dismissed.

As to Trading with the Enemy, see HALSBURY, Hailsham Edn., Vol. 1, pp. 460, 461, para. 179 ; and for Cases, see DIGEST, Vol. 2, pp. 169-174, Nos. 379-400.]

Cases referred to:

(1) *R.* v. *Kupfer*, [1915] 2 K.B. 321; 2 Digest 170, *385*; 84 L.J.K.B. 1021; 112 L.T. 1138.

(2) *R. & A. Kohnstamm, Ltd.* v. *Ludwig Krumm (London), Ltd.*, [1940] 2 K.B. 359; [1940] 3 All E.R. 84; Digest Supp.

(3) *Schmitz (Schmidt)* v. *Van Der Veen & Co.* (1915), 84 L.J.K.B. 861; 2 Digest 172, *387*; 112 L.T. 991.

(4) *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co. (Gt. Britain), Ltd.*, [1916] 2 A.C. 307; 2 Digest 145, *195*; 85 L.J.K.B. 1333; 114 L.T. 1049.

(5) *Stevenson (Hugh) & Sons* v. *Akt. für Cartonnagen Industrie*, [1918] A.C. 239; 2 Digest 177, *416*; 87 L.J.K.B. 416; 118 L.T. 126.

Appeal by the plaintiffs from a judgment of Hawke, J., dated Sept. 26, 1940. The facts are fully set out in the judgment of Sir Wilfrid Greene, M.R.

C. R. Havers, K.C., and *Valentine Holmes* for the appellants.

A. T. Miller, K.C., and *J. A. Wolfe* (for *Maurice Berkeley* on war service) for the respondents.

Havers, K.C.: In any event, the proper course in this action is to enter judgment for the appellants and grant a stay. If the respondents make payment to the appellants, they will be discharging their own obligation under the agreement and they will not discharge any obligation of the German company. There is an obligation upon the appellants to assign to the respondents a portion of the debt of the German company on payment being made by the respondents. Payment followed by assignment would be relieving the German company of its primary obligation. The English company, if it so chose, need not take an assignment. Unless and until an assignment of a proportionate part of the debt is taken, the payment by the English company to the Swedish bank does not discharge any obligation of an enemy. If and when an assignment is taken, the result will be a transfer of the obligation from the German company, and, instead of being an obligation to the Swedish bank, it will become an obligation to the English company. That would not amount to a discharge of an obligation of an enemy within the meaning of sect. 1 of the Act. If the respondents paid the appellants, they could take an assignment of a proportionate part only of the debt, and the respondents could not require payment until the debt became due in April, 1944. The benefit of the discount will fructify for the benefit of the German company in Apr., 1944, and not earlier. In *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co. (Gt. Britain), Ltd.* (4), Lord Parker of Waddington said, at p. 347, that it was suggested that acts otherwise lawful might be rendered unlawful by the fact that they might tend to the enrichment of the enemy after the war was over, and he dissented from that view. In *Stevenson (Hugh) & Sons* v. *Akt. fur Cartonnagen Industrie* (5), Lord Atkinson, at p. 249, expressed agreement with the *dicta* of Lord Parker of Waddington. Lord Parmoor also agreed, at p. 258, with what Lord

Parker of Waddington said. *R.* v. *Kupfer* (1) was a decision on the meaning of the 1914 Act, and the observations of Viscount Reading in that case show what interpretation should be put upon similar words in the 1939 Act. The words "payment for the benefit of an enemy" do not cover a payment made in pursuance of a legal obligation which merely has the incidental result that a German company will benefit. In the present case, there is, without doubt, a previous pre-war obligation of the English company to the Swedish bank. The Trading with the Enemy Act, 1939, is not intended to prevent a payment in discharge of such an obligation merely because it incidentally benefits an enemy. In the present case, the appellants are entitled to judgment, although the court may think it right to impose a stay in order to prevent the appellants from enforcing the judgment. This point was considered by Rowlatt, J., in *Schmitz (Schmidt)* v. *Van Der Veen & Co.* (3).

Holmes followed on the same side.

Miller, K.C.: The answer to the claim under the contract is supervening illegality. The illegality is the result of the Trading with the Enemy Act, 1939, which adds to the restrictions imposed by our law upon dealings with the enemy. That is a complete defence. The contract was perfectly legal when it was entered into, but it became illegal before the date of performance arrived. In the circumstances, the answer is that it is illegal to pay, and not that the payment must be deferred by some stay. It is necessary to distinguish between payments under contracts which may benefit an enemy and problems which arise from payments in respect of property belonging to an enemy. The two things must be distinguished. The Act plainly prohibits anything being done by way of financial dealings for the benefit of an enemy. There is nothing in the Act which would justify the court in saying that it could be done if the payment were primarily to discharge a legal obligation resting upon the payer. Any payment is prohibited if it is for the benefit of an enemy. By the terms of the contract, every 12*s*. which is paid reduces the principal debt by £1. Every payment which is made preserves the benefit of the contractual discount for the German company. The payment would not only benefit the German company, but would diminish its obligation.

Havers, K.C., in reply: Frustration of the contract was not pleaded in the court below. Short of frustration, there is no defence to the present case on the merits. The only objection is an objection which comes after judgment. The right of payment is suspended so long as the person to whom the payment has to be made is an enemy alien. There should be relief in favour of the appellants, either by judgment or by a declaration.

Sir Wilfrid Greene, M.R.: The transactions out of which this litigation arose are somewhat unusual, but, from the commercial point of view, they are intelligible, having regard to the relationship of the parties and to the exchange difficulties which were prevalent at the time. The present appellants, who are a Swedish banking company, were the owners of a sum of German reichsmarks, which, at the current official rate of exchange, were worth £84,000 sterling. These reichsmarks a German company, known as Schering-Kahlbaum Aktiengesellschaft of Berlin, was minded to acquire. The appellants were willing to place these reichsmarks at the disposal of the German company on the terms that they should receive repayment, on certain agreed terms, in sterling. The sum of sterling which they were to receive was £50,400. That is to say, they were placing at the disposal of the German company reichsmarks the official value of which was £84,000 in consideration of a promise to pay a reduced sum of £50,400. Putting it shortly, they were selling those reichsmarks at a substantial discount. We were told that the figure works out at 8*s*. in the £. The existence of exchange difficulties which might have made it difficult, if not impossible, for the German company to discharge that sterling obligation, apparently led to the introduction into the transaction of two companies, one of them the present respondents, a company incorporated in the United Kingdom, and the other a company incorporated in India. I will call those two the English company and the Indian company, respectively. Those two companies were subsidiaries of the German company, and it seems that the payment of a sterling sum to the appellants could be conveniently arranged through the medium of those two companies, who were not, of course, subject to any restrictions in force in Germany in relation to foreign exchange.

With those prefatory observations, which I think assist in understanding the nature of the transactions, I come to look at the documents by which they were to be effected. The actual contract upon which the appellants are suing, dated Apr. 16, 1936, was made between the appellants, the English company—that is to say, the respondents—and the Indian company, but, in order to understand the results which would flow from the performance of the obligations undertaken by the English company under that agreement, it is necessary to look at an earlier document, dated Feb. 24 and Feb. 28, 1936. It is made between the appellants of the one part and the German company of the other part, and also the English and Indian companies as sureties. It is in the German language, and, from the translation which we have, its terms were to the following effect, so far as it is necessary to refer to them. The contract is described as a contract of debt. By cl. 1, the appellants agree to place at the disposal of the German company the reichsmarks to which I have referred, valued, at the official rate, at £84,000 sterling. Cl. 2 makes the German company a debtor to the appellants in the sum of £50,400 sterling, free of interest. That debt was to fall due at the end of 8 years, and was to be repaid in sterling, unless the foreign exchange enactments then in force in Germany should prevent it. In that event, if the enactment required that the amount of the debt should be paid into a blocked account, payment was to be in reichsmarks at the official Berlin rate of exchange. Then comes cl. 3, under which the English and Indian companies, described as the sureties, constituted themselves surety jointly and severally as principals to the amount of £50,400. Then cl. 4 contains an ancillary provision, which, of course, is not a provision which flows from the relationship of principal and surety, but was obviously inserted to give effect to the arrangement under which the sterling necessary for repayment of the loan should be provided by the English company and the Indian company, or by one of them. That clause provides that the sureties are to acquire from the appellants their claim against the German company by instalments, and then a table is set out giving the dates on which, and the amounts of sterling in which, those instalments are to be paid. The clause, therefore, is one under which the two companies are agreeing to purchase by instalments the sterling debt incurred by the German company to the appellants. There then follows a curious but intelligible provision. I will paraphrase the language used, which, in the translation, is somewhat obscure, but the meaning of which, it is agreed, is of this nature: if the two companies made default in acquiring an instalment of the debt on the due date, that being a sterling payment, the result was to be that the German company would lose the benefit of a proportionate part of the discount which they enjoyed in purchasing the reichsmarks. I have pointed out that this discount was 8*s.* in the £—I will take that without doing the calculation myself, because we were told that that was the figure—and, if the companies made default in buying the debt by instalments, the result would be that the debt of the German company would be raised to the nominal figure of £84,000, less the payments already made, if any, by the two companies, those payments being treated as payments of 20*s.* for every 12*s.* in fact paid. In other words, the primary debt of the German company is the debt of £50,400, which is 12*s.* in the £ on £84,000. If that debt was duly taken over by instalments in accordance with the contract, the only sum which the appellants would receive would be £50,400. If, on the other hand, default was made in the payment of an instalment, the German company came under a liability to pay the full £84,000, taking credit, as against that, of all payments previously made by the two companies, treating every 12*s.* which they had paid as in effect a payment of £1. It leaps to the eye that it is to the advantage of the German company that those obligations of the English and Indian companies should be carried out punctually and in accordance with those terms, because the result of their not doing so would be to impose upon the German company a greater obligation, in that their debt would fall to be scaled up by the disappearance or diminution of the discount. The next clause to which I must refer is cl. 7, which empowers the appellants to call in the debt immediately, by registered letter to the German company, if the German company, or one of the sureties, should become bankrupt or apply for an arrangement with its creditors.

Clause 8 provides that the contract of debt is to be subject to German law, but that English law is to apply to the legal relationship between the English and Indian companies, on the one hand, and the appellants, on the other. That is all that I need refer to with regard to that document.

A It appears that, so far as the obligations of the English and Indian companies are concerned, they are, in the first place, constituted sureties for the debt, and, in the second place, they assume the obligation as principals of purchasing that debt by instalments, the result of the purchase being that the obligation of the principal debtor (the German B company) to the appellant is step by step reduced as the instalments are paid.

The other document, which is the one which is sued upon, is dated Apr. 16, 1936, and, as I have said, is between the appellants and the English and Indian companies. It provides that, in consideration of the C appellants making, on the joint and several request of the two companies, an advance of £84,000 sterling, to be made available in sperrmarks to the German company, the two companies, English and Indian, jointly and severally guarantee the payment in sterling of the amount thereinafter mentioned by the German company. I may say in parenthesis D that sperrmarks are, or were, as we are informed, a type of reichsmark which was more effectively blocked than any other mark under the German currency laws. There is no question that the sperrmarks there referred to are the marks which, under the previous contract, were to be placed at the disposal of the German company. There are certain formal E clauses in this document which I need not read. Then comes a provision that the amount recoverable under it should in no case exceed the sum of £50,400. That, of course, is in accordance with the terms of the other contract. Then comes another clause (again inserted in order to carry out the arrangement contemplated by the earlier con- F tract), under which the two companies jointly and severally undertake as principals, and not as guarantors, to make the following payments to the appellants in consideration of the assignment by the appellants to the two companies on the occasion of each such payment of a like sterling amount of the appellants' claim against the German company. G Then are set out the dates on which, and the instalments by which, those payments are to be made, one of them being as follows:

> On or before the expiration of 3 years and 6 calendar months from the aforesaid date the further sum of £3,360.

It is in respect of that sum that the present action is brought. Accord- H ingly, by this document the two companies, as I have pointed out was the intention, are, as principals, agreeing to purchase the sterling debt owing by the German company to the appellants, and to pay for it in sterling. Then comes a provision that each of the payments should be a satisfaction *pro tanto* of the liability of the two companies' in respect of their guarantee, and the document ends by providing that it is to be governed by the law of England.

The instalment to which I have referred was not paid, and on Oct. 30, 1939, the appellants issued their writ against the respondents, claiming payment of that instalment. It was pointed out in the course of the argument that that claim is technically incorrect. Quite apart from considerations of the war and war legislation, the appellants are entitled to claim payment only against an assignment by them of the proper part of the German company's debt. That is the only obligation which the respondents undertook. They were buying the debt by instalments, and they were liable to pay only against the handing over of the necessary document of assignment. In truth, the proper form of the action of the plaintiffs would have been an action for specific performance, in which they would have claimed specific performance of that agreement, and would have obtained an order (assuming they were entitled to it in other respects) that, against payment of the money, they should execute an assignment, or, putting it the other way round, that, on delivery of a proper assignment by them, the defendants should pay. That aspect of the matter has a bearing when I come to consider one of the arguments put forward on behalf of the appellants. I do not refer to it on any technical ground, but it does relate to a point of substance which counsel for the appellants raised in his argument.

The defence consisted of an allegation that the German company was an enemy within the meaning of the Trading with the Enemy Act, 1939, and a contention that, if the defendants made the payment claimed in the statement of claim, they would be guilty of the offence of trading with the enemy within the meaning of sect. 1 of that Act, on the grounds set out in the defence.

The only question which arises in the action, and which arises now, is as to the application of the relevant provisions of the Trading with the Enemy Act, 1939, to the facts of this case. Sect. 1 of that Act provides that any persons who trade with the enemy within the meaning of the Act shall be guilty of the offence of trading with the enemy. Then it sets out the penalties for that offence. Subsect. (2), so far as relevant, provides as follows:

> For the purposes of this Act a person shall be deemed to have traded with the enemy (*a*) if he has had any commercial, financial or other intercourse or dealing with, or for the benefit of, an enemy, and, in particular, but without prejudice to the generality of the foregoing provision, if he has . . . (ii) paid or transmitted any money . . . to or for the benefit of an enemy . . . or (iii) . . . discharged any obligation of an enemy, whether the obligation was undertaken before or after the commencement of this Act . . .

It was held by Hawke, J., that payment by the respondent company of the sum claimed in this action would be a breach of the Act in three respects. First, he said that it would be a dealing for the benefit of an enemy, and would therefore come within the general words which I have already read, secondly, he held that the payment would be payment for the benefit of an enemy, and, thirdly, he held that the effect of paying would be to discharge an obligation of an enemy. The definition of "enemy" is contained in sect. 2, but I need not read it, because there is no question, of course, in the present case, that the German company is an enemy within the meaning of the Act.

It was argued by counsel for the appellants that, in construing the general words "for the benefit of an enemy," a narrow meaning should be attributed to them, in the sense that they should be limited to cases where, by some device or some circuitous means, an attempt was being made to get some benefit into the hands of an enemy, and he said that the words should not be construed in such a way as to cover a perfectly *bona fide* pre-war financial transaction merely because one of the indirect results of it would be to benefit an enemy. In support of that argument he referred to a judgment of the Court of Criminal Appeal in *R.* v. *Kupfer*(1), and in particular to some observations by VISCOUNT READING in delivering the judgment in that case, in which he puts, as the object of the legislation and in particular as the object of these words (they were the corresponding words in the legislation then in force), the avoidance of indirect devices and tricks and so forth designed to evade the purpose of the Act. I am quite unable to accept the argument that that case is any authority for saying that the words to which I am referring should be construed in such a way as to confine them to that class of transaction. The language of the judgment in that case does not, to my mind, suggest for one moment that any such limited construction was intended to be placed upon the words by the court. Indeed, on no principle of construction known to me would it have been possible to have limited the perfectly simple and general words "for the benefit of" in such a way. On the contrary, in my opinion, those words are of the widest possible character, and they are wide enough to take in any transaction of which it can be truly said (and this is a question of fact in each case) that it is for the benefit of an enemy.

At what particular point the line would have to be drawn, what particular degree of benefit, and what questions of remoteness might arise, of course, will depend on the facts of each individual case, and it would be improper to attempt to suggest any limitation for those words. It is worth bearing in mind that a wide interpretation of a phrase of that kind in legislation of this character is all the more justified in the present case, in that, in a case of great hardship, or in a case which might technically come under the words of the Act but nevertheless would produce no practical injury to the state, the matter can be dealt with under a provision by which a Secretary of State or the Treasury or the Board of Trade can grant a licence. That seems to me to be a further justification for giving the words what I must confess to me appears to be their natural construction, which is an extremely wide and all-embracing one.

I now come to consider the substantial questions in this case, and, in the first place, it falls to be considered whether the payment of the instalment now in question would be for the benefit of the German company. It seems to me clear that it would be for the benefit of the German company. The effect of the payment would be, in the first place, to preserve for the German company the substantial benefit of the discount, a benefit which it loses if no payment is made. Secondly, the German company, by payment, would be relieved of its obligation to the appellants *pro tanto*. That relief is unquestionable. It is true that, on such payment A being made, the German company would come under a liability to pay a corresponding amount to the respondents. Whether or not that result, on balance, and looking at figures alone, would be a benefit to the German company it is impossible to know. For all we know, it may be that the English company is a book debtor to the German company. It seems to B me that that is not a thing into which this court can inquire. We are confronted with the fact that a liability to a neutral company would be discharged, and there would be substituted for it, putting it at the highest, a liability to a British company, a liability, be it observed, which that British company could not enforce during the war. There is nothing to C prevent the appellants, so far as we are entitled to assume, from suing the German company and obtaining payment when the due date arrives. That date may be in 1944, or, under cl. 7, it may be earlier, but the effect would be to substitute a British creditor for a neutral creditor, and that seems to me to be a benefit to the German company. Accordingly, D in my opinion, the judge was right in holding that the case comes within the general words of sect. 1 (2) (*a*). He was also right, in my opinion, in holding that it came within the words "paid . . . money . . . to or for the benefit of an enemy" under para. (*a*) (ii). My reasons for taking that view are the same as those which I have given in dealing with the general E words, and I can add nothing to them.

I am also of opinion that payment by the respondents would discharge an obligation of the German company. That requires very little to be added to what I have already said. It was suggested by counsel for the appellants that mere payment of this sum would not operate to discharge F the German company of its obligation to his clients, and that that discharge would take place only if and when an assignment of the appropriate part of the debt to the respondents was made. He said that all that he was asking for was payment, and asked why he should not have payment even if the assignment was a thing which he would not be entitled to make. G Here comes the materiality of the point which I mentioned in relation to the form of the statement of claim. The right of the appellants is to receive payment for the commodity which they have agreed to sell—namely, part of the German company's debt—and they will not be entitled to receive payment unless they are ready and willing and are prepared H against payment to make the assignment. Accordingly, it never could be the case that they would be entitled to receive payment and leave the assignment, so to speak, held up. The two transactions, payment and assignment, are part of one and the same thing. That was the contract entered into. It is one and indivisible, and, if the carrying out of that contract by payment and assignment is going to result in the extinguishment of the German company's obligation to the appellants, it seems to me that it cannot be questioned that the carrying out of it will be a discharge of the obligation of an enemy. It is nothing to the point, in my opinion, to say that contemporaneously with such discharge the German company comes under a liability to the respondents. It does not seem to me that this case would in any way alter the fact that the obligation of the enemy to the appellants had been discharged. In connection with that matter, reliance was placed upon a recent decision of MACNAGHTEN, J., in *R. & A. Kohnstamm, Ltd.* v. *Ludwig Krumm (London), Ltd.* (2). That was a simple case of principal and surety, and MACNAGHTEN, J., took the view that, where a surety discharges the debt of the principal debtor, and thereby becomes entitled to recover a corresponding amount from the principal debtor, it is not correct to say that the obligation of the principal debtor has been discharged within the meaning of the relevant words of the Trading with the Enemy Act, 1939. The facts of that case were quite different from those in the present case, and the point dealt with by MACNAGHTEN, J., was not a point which it falls to this court to consider. It would therefore not be proper for this court, not having heard it argued to the full as to whether or not that judgment is right, to express any opinion about it one way or the other. It is sufficient to say that it lays down no principle which governs the special facts of the present case, and I obtain no assistance from it.

That disposes of the substantial matters which arise in the appeal, but a further point was taken by counsel for the appellants which we understand was not taken below. It was of this nature. He said that, even though payment of the amount of this instalment would be an offence under the Act, and, therefore, not permissible at the present time, he was entitled at any rate to a judgment which would declare and settle his rights, although he agreed that, if he were entitled to such a judgment, he would have to submit to some sort of stay to prevent payment from being made during the continuance of the war or until a licence was obtained. He said that his substantial right was undisputed on the merits, and that the only thing which was prohibited by the Act was payment, and that, provided no payment was made, no offence would be committed. I cannot take that view. He is claiming payment of a sum of money, and he is claiming it at a time when the law of this country declares that the thing for which he is asking—namely, payment—is illegal, and the fact that illegality has struck what in its origin was a perfectly innocent and proper transaction is, it seems to me, an answer to the claim. It is true that, as far as anything in this Act of Parliament is concerned, the prohibition of payment is a temporary one. It exists only so long as the payee, or the person to receive the benefit, is an enemy. If and when he ceases to be an enemy, then, in the absence of further legislation affecting his rights, according to ordinary principles, he will be entitled to receive the benefit which was to flow to him under the machinery of these agreements. At the moment, that benefit is prohibited, and it seems to me that that circumstance in this case is a defence to the action. It was suggested by counsel for the appellants, although he did not pursue it—and, in fact, in the end, he said that he did not rely upon it—that the dismissal of the present action might operate so as to allow the defence of *res judicata* to be set up in the event of an action being brought after the war or after a licence had been obtained, if it could be obtained. There is really nothing in that point, because the fact that the action cannot be brought at this time does not mean that it is going to be incompetent for ever. The true analogy seems to me to be the case of an action prematurely brought. The dismissal of such an action would not prevent the plaintiff from bringing another action when the proper time had elapsed. Therefore, I say nothing more about that. On principle, I should have felt no doubt that the plea of the statute was a defence to the action, and that, once it was established, the action should be dismissed with the usual consequences. However, our attention was called to a decision of Rowlatt, J., during the Great War in *Schmitz* (*Schmidt*) v. *Van Der Veen & Co.* (3). That was a case where the plaintiff had a business agreement with a German in Germany under which the plaintiff purchased goods from the German and sold them in London. The excess of what he received over a certain fixed sum was to be divided equally between himself and the German, and he was also to receive a commission. The action was by the plaintiff against defendants to whom he had sold the goods, and the defendants raised the point that the plaintiff could not recover because, having regard to the arrangement between the plaintiff and the German, the German would be entitled to his proper contractual share of the profit on the transaction. On that matter, the judge, in dealing with the case, took the view that he could give judgment for the plaintiff, provided that the order was so framed as to ensure that no part of the money paid should find its way into the hands of the German. The case was quite different from the present case in this respect. What was being dealt with was a sum of money in this country, to a proportion of which the German was entitled. There was then, as there is now, machinery for vesting in the Custodian of Enemy Property the rights of enemies to property of that kind. The business was a business for the joint benefit of a British subject and a German. One result of the claim set up by the defendants would have been that the British subject would not have got his share of the money, but, that machinery being in existence, so that, if a vesting order were made, no possible objection could be taken to the payment (because payment to the Custodian would not be payment for the benefit of an enemy and an offence under the Act), the judge made an order under which he stayed execution until a summons for a vesting order should be taken out and dealt with. If a vesting order had been made, as it very well might have been, before the action was instituted, it seems to me that there would have been no defence under the Trading with the Enemy Act at all, because the result of the defendants in that case making the payment which they were liable to make would have been that the German's share of it would have gone to the Custodian, and there would have been no offence committed. In the present case, the benefit which the German company would obtain would be a benefit which no vesting order made in this country could prevent it from obtaining. It is a benefit which accrues to it automatically the moment the payment is made, and there is no possible means of stopping it, by a vesting order or otherwise. It seems to me, therefore, that the view which I have taken as to the proper way of dealing with the present case in no way conflicts with the view taken by ROWLATT, J., as to the appropriate method of dealing with the case before him. The consequence is that the appeal fails, and must be dismissed with costs.

MACKINNON, L.J.: I agree, and there is nothing which I can add. There is nothing in the judgment of SIR WILFRID GREENE, M.R., which I can express better, so I will add nothing.

DU PARCQ, L.J.: I also agree, for the reasons already expressed by SIR WILFRID GREENE, M.R., and concurred in by MACKINNON, L.J., and I abstain from adding anything.

Appeal dismissed with costs.

Solicitors: *Slaughter & May* (for the appellants); *Kenneth Brown, Baker, Baker* (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Distinguished. BROWN *v.* SHEEN AND RICHMOND CAR SALES, LTD. [1950] 1 All E.R. 1102.

Distinguished. SHANKLIN PIER, LTD. *v.* DETEL PRODUCTS, LTD. [1951] 2 All E.R. 471.

DRURY *v.* VICTOR BUCKLAND, LTD.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **January 27, 1941.**]

Hire Purchase—Goods sold to finance company—Hire-purchase agreement with purchaser—Implied warranty of fitness—Sale of Goods Act, 1893 (*c.* 71), *s.* 14.

The plaintiff was approached by an agent of the defendants with reference to the purchase of an ice-cream maker. After some negotiation the plaintiff paid £10 10*s.* 0*d.* deposit to the defendants, and agreed to discharge the balance by paying a number of instalments to a finance company. Each of these instalments included an interest charge. The full terms were set out in an invoice sent to her by the defendants, but she entered into a hire-purchase agreement with the finance company and signed a delivery note sent by them. The plaintiff subsequently alleged that the machine was unsatisfactory, and thereupon sued the defendants for breach of implied warranty under the Sale of Goods Act, 1893, s. 14. She contended that the transaction was a sale by the defendants, but the defendants contended that the transaction was a contract of hire purchase between the plaintiff and the finance company:—

Held: in the circumstances of this case, the contract was one of hire purchase and not one of sale, and the action failed.

[**EDITORIAL NOTE.** This case is one of considerable practical importance. It is now common knowledge that sales are commonly carried through by the aid of a finance company. The details of the transaction may vary, but a very common form is that here considered, in which the dealer sells the article to a finance company, who then enter into a hire-purchase agreement with the actual purchaser. It was sought here to treat this in law as a sale by the dealer, and to sue him for breach of implied warranty, but, though for some purposes that may be the substance of the transaction, in the present case it was held that the hire-purchase agreement was a real transaction, and that the dealer was not liable on the warranty implied by the Sale of Goods Act, 1893. That is to say, the transaction took the form of a hire-purchase agreement between the purchaser and the finance company and not that of a sale between the purchaser and the dealer. The purchaser could have sued the finance company under the Hire-Purchase Act, 1938, sec. 8 upon an implied warranty, but had no cause of action against the dealer. The purchaser relied upon certain passages in the judgment in *Menzies* v. *United Motor Finance Corporation, Ltd.* (1); but these are here explained as applying to quite different circumstances.

As to Implied Warranty, see HALSBURY, Hailsham Edn., Vol. 16, pp. 515, 516, para. 759; and for Cases, see DIGEST, Vol. 3, pp. 86-88, Nos. 203-216.]

Cases referred to:

(1) *Menzies* v. *United Motor Finance Corporation, Ltd.*, [1940] 1 K.B. 559; [1940] 1 All E.R. 549; Digest Supp.; 162 L.T. 175.

(2) *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462; 22 Digest 26, *57*; 41 L.J. P. & M. 68; 27 L.T. 215.

Appeal by the defendants from an order of His Honour Deputy Judge Sadler, sitting at Chesterfield County Court, dated Oct. 11, 1940, and awarding the plaintiff £50 damages and costs, or breach of warranty on the sale of a refrigerator or ice-machine. The facts are fully set out in the judgment of Scott, L.J.

The Sale of Goods Act, 1893, s. 14 (1), provides as follows:—

> Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose . .

George Maddocks for the appellants.

T. R. F. Butler for the respondent.

Maddocks: There was no contractual relationship between the respondent and the appellants. The hire-purchase agreement was admitted by the respondent. The facts of *Menzies* v. *United Motor Finance Corporation, Ltd.* (1) were quite different from those of the present case.

Butler: It was entirely a question of fact for the county court judge. If the case had been tried by a jury, there was evidence of a sale by the appellants fit to be submitted to the jury. This court should not interfere with the county court judge's finding of fact.

Scott, L.J.: This is a claim for breach of warranty by the purchaser of a refrigerator or ice-machine, an expensive apparatus costing £105 for cash payment. At the time of the supposed purchase, the purchaser entered into a hire-purchase agreement of quite a common kind with a finance company called the Equipment Trust Co., Ltd. That document records the relationship of hire purchase between her as hirer and the Equipment Trust Co., Ltd., as owner in the form of an offer made by her on a printed form to the Equipment Trust Co., Ltd., which was signed by her on May 11, 1938. On the same date, a document purporting to be an invoice was signed by the defendants in the action, Victor Buckland, Ltd., purporting to invoice the apparatus to her. It was there described as the "refrigeration company's model ice-cream maker and storer, £105," and credit was given to her in the invoice for a deposit of £10 10*s*., purporting to show a balance due of £94 10*s*. Added to that was an item of interest charges amounting to £19 7*s*., making a total liability of £113 17*s*. followed by the words "payable by thirty-six monthly instalments of £3 3*s*. 3*d*.," to which the initials "H.J.J." were attached. Those were the initials of the agent of Victor Buckland, Ltd., who had on several occasions, according to the evidence of the plaintiff, approached her in order to persuade her to purchase such a machine.

The hire-purchase agreement, which tallies accurately with the figures of the so-called invoice, provides for payment of the instalments to the Equipment Trust Co., Ltd., and not to Victor Buckland, Ltd., as sellers. Mrs. Drury stated in evidence that she said to the defendants' agent that she could not afford to buy one. It was said that he called several times, and, further, that, in the course of one or other of the interviews, in answer to her question, "Supposing it goes wrong?" he said that, if it did, she was to ring them up, and that she had no need to worry about it, as they would service it for eighteen months free. She said nothing of the hire-purchase agreement in examination-in-chief, but in cross-examination she admitted that she signed it, and she admitted further that she had paid instalments to the Equipment Trust Co., Ltd., regularly from June, 1938, to Aug., 1939, and she also admitted that she signed a delivery note, which was produced and is attached to the hire-purchase agreement. It is dated May 19, and was addressed to the Equipment Trust Co., Ltd.:

> I acknowledge to have accepted delivery in good order and working condition of the following [description and identifying number of the ice-cream maker and storer] which is let to me as hirer under a hiring agreement made effective by your acceptance of my offer to you, dated May 5.

That is the offer to which I have already referred. At the foot of the invoice, which, though it is dated May 11, presumably was completed on May 19, is this entry: "Received from Mrs. Drury, £10 10*s*."

It is obvious that she could not afford to pay cash. It is obvious also that she was induced—I use a neutral expression purposely—to have the apparatus on being told by the agent that he could arrange the finance.

The question we have to decide is this. The county court judge held that there was no real transaction of hiring, but that there was a sale. Was there any evidence upon which he was justified in coming to that conclusion? Was there evidence which was fit to be submitted to a jury if the case had been tried by a jury? I think myself that it is clear on the documents and on Mrs. Drury's own evidence that the transaction was one which she understood quite well—namely, that she was getting the apparatus on hire-purchase. That she knew anything about the law of hire-purchase, or the difference between an ordinary purchase and a hire-purchase, I doubt, but the documents speak for themselves. In my view, as she signed the hire-purchase agreement and then signed the hire-purchase delivery note, and paid the hire-purchase instalments to the finance company, there can be no doubt that that was the reality of the transaction. It was a matter of indifference to the defendants whether they got the cash from her—obviously her credit was not good enough for them—or some cash instalments somehow and the credit of the finance company, which obviously was satisfactory to them. Consequently, I can see no evidence at all before the county court judge which justified him in coming to the conclusion that the transaction was one of sale, and that the hire-purchase agreement had no reality in it. In coming to that conclusion, he said that he intended to follow the view expressed by Goddard, L.J., in *Menzies* v. *United Motor Finance Corporation, Ltd.* (1). Goddard, L.J., was a member of the court there and delivered an interesting judgment, and therefore, I shall leave it to him to add a word or two upon his own judgment.

In my view, however, the facts of that case were quite different from those of the present case, and Goddard, L.J., used no expression which justified the interpretation which the county court judge has put upon it. These cases are always pure questions of fact, in the light of the documents, as to what the transaction in fact was. Here, the evidence outside the documents supports the documents, and I do not think that there was any evidence before the county court judge which justified him in saying that the documents did not represent the reality. I think that the document called the hire-purchase agreement was the reality, and that the use of an invoice form by the defendant company was not any evidence in the circumstances, that there had been a sale by them. Being merchants, they would naturally send out an invoice, and very likely they would not think that the word "invoice" at the top of the document made any difference. That they realised what the nature of the transaction was, however, appears from the contents of the invoice, to which I have referred—namely, that there was to be a deduction of the amount of the first payment, and that the balance was to be the subject of a hire-purchase agreement, including interest charges payable to the finance company, out of which it made its profits, and that there was to be payment to them, or to somebody, by thirty-six monthly instalments, which in fact were instalments covered by the hire-purchase agreement of even date. It was a sale by the Buckland company to the hire-purchase company. The property passed to them on the terms that they would get paid by the hire-purchase company, as no doubt they were in fact. Therefore, the claim against them for damages for breach of warranty is a cause of action unsupported by any contract of sale which would carry it, and the appeal must be allowed, with costs here and below.

CLAUSON, L.J.: I agree that the appeal must be allowed, for the reasons given by SCOTT, L.J. I would only add these few observations. There is in existence a document in the shape of an invoice which, it was strongly urged, was some evidence that there was a sale by the defendants' agent to the plaintiff. Having regard to the contents of the document, to which SCOTT, L.J., has referred, and in particular to the fact that the figure reached as the total balance is reached by adding in interest charges, obviously implying that there shall be something of the nature of a payment by instalments, consisting partly of the purchase price and partly of interest, I am not at all sure that it is any real evidence at all of a sale. However, I think that it is desirable to make this observation. The function of this court, in dealing with a matter in which it is suggested that a judge has gone wrong in law in accepting certain evidence, is, in legal effect, very much like that of a judge in determining whether the evidence before him is sufficient to be left to a jury. In the course of the hearing, I ventured to refer to what seems to me a very useful passage in the judgment of LORD PENZANCE in *Parfitt* v. *Lawless* (2), at p. 471, in reference to the exact function of a judge in coming to that determination. It appears to me to be precisely analogous to the function of this court in considering whether a county court judge has gone wrong in a matter of this kind. I do not propose to add to the length of this judgment by repeating the observations of LORD PENZANCE, but I commend them to the consideration of those who seek either to uphold or to displace a finding of fact by a county court judge on appeal to this court.

GODDARD, L.J.: I agree. I am afraid that a sentence or two in the judgment which I delivered in *Menzies* v. *United Motor Finance Corporation, Ltd.* (1), at p. 569 ([1940] 1 All E.R. at p. 554), may have misled the deputy county court judge here. The question which the court had to consider in that case was very different from that which we have to consider here. What the court had to consider in that case was the true hire-purchase price for the purposes of the Hire-Purchase Act, 1938. The question in that case really was whether the hire-purchase price was under

£50, as we found in fact it was, so that the Act applied, or whether it was over £50. In the course of the judgment, I tried to explain how these hire-purchase finance agreements are really worked, and I did use the expression that "in essence the transaction was a loan of money by the finance corporation." From one point of view, that may be right; but I did not intend to say that, where there is a hire-purchase finance company which buys the subject of the transaction from the dealer, the transaction can be regarded merely as a loan, because I pointed out later in my judgment, at p. 570 ([1940] 1 All E.R., at p. 555):

> . . . the property in the chattel passes to the hire-purchase finance company, who thereupon let it out to the person who all along has been anxious to get the benefit of the machine or article, as the case may be.

I did not intend to say that the transaction could be regarded for all purposes as one of loan and that the true transaction was a sale by the manufacturer to the buyer, because in truth it is not.

Appeal allowed with costs in both courts.

Solicitors: *G. A. Hathway*, agent for *Flint, Marsden & Bishop*, Derby, (for the appellants); *King, Wigg & Brightman*, agents for *W. Charlesworth*, Chesterfield, (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

CAMPBELL *v.* CAMPBELL AND LEWIS.

[Court of Appeal (Sir Wilfrid Greene, M.R., Luxmoore and Goddard, L.JJ.), **January 16, 17, February 5, 1941.**]

Solicitors—Costs—Lien—Common law lien on property or funds recovered—Costs in divorce suit—Discretion of court.

A husband obtained a decree of divorce and was ordered to pay his wife's taxed costs. There had been a cross-petition by the wife and an intervention by an intervener. The intervener was dismissed from the suit, and was given costs against the wife. The husband took an assignment for full consideration of the intervener's costs, but the Court of Appeal refused to allow a set-off of those costs against those which the husband had been ordered to pay to the wife. After allowing for the amount paid into court as security for the wife's costs, there was a balance of £276 15*s*. 10*d*. due from the husband to the wife. The intervener's costs were taxed at £302 1*s*. 11*d*.. The solicitor acting for the wife applied for a charging order in respect of the sum of £276 15*s*. 10*d*., the application being in terms sufficiently wide to cover an application at common law and under the Solicitors Act, 1932, s. 69:—

HELD: the solicitor was entitled at common law to a charge for the sum of £276 15*s.* 10*d.*, the balance of the costs ordered to be paid by the husband.

[**EDITORIAL NOTE.** The solicitor in this case might have been entitled to a charge for his costs at common law—sometimes referred to as being under the inherent jurisdiction of a court to protect a solicitor—or under the Solicitors Act, 1932, s. 69, which is a re-enactment of the Solicitors Act, 1860, s. 28. At the hearings from which this appeal is brought, the applicant relied upon the statutory charge, and, indeed, on the appeal that form of charge was relied upon until it was pointed out by the court that the solicitor was clearly entitled to a charge at common law. Whether or not he was also entitled to a statutory charge is left open, the Court of Appeal thinking that he might be, but not expressly deciding the point. The granting of the common law charging order, being an exercise of the inherent jurisdiction of the court, is necessarily in the discretion of the court, and it was argued that the fact that the husband had taken an assignment of the intervener's claim for costs against the wife was a reason for refusing to exercise this discretion. The Court of Appeal, however, did not adopt this view.

AS TO CHARGING ORDERS FOR COSTS, see HALSBURY, Hailsham Edn., Vol. 31, pp 253, 254, para. 276; and FOR CASES, see DIGEST, Vol 42, pp. 273-287, Nos. 3066-3219.]

Cases referred to:

(1) *Ex p. Rhodes* (1809), 15 Ves. 539; 4 Digest 523, *4784*.
(2) *Ex p Bryant* (1815), 1 Madd 49; 42 Digest 276, *3097*.
(3) *O'Brien* v. *Lewis* (1863), 13 De G. J. & Sm. 606; 42 Digest 276, *3099*; 32 L.J.Ch. 665; 8 L.T. 683.
(4) *Dallow* v. *Garrold, Ex p. Adams* (1884), 14 Q.B.D 543; 42 Digest 302, *3366*; 54 L.J.Q.B. 76; 52 L.T. 240.

APPEAL by the wife's solicitor from an order of HENN COLLINS, J., dated Nov. 14, 1940. The appeal was by Louis Alfred Hart, a solicitor at present away on war service. At all material times he was the solicitor for Lady Campbell in a matrimonial cause in which there were cross-petitions. The appeal was brought by leave of the judge from his affirmation of the refusal of the registrar to grant an order. The petition was brought by Sir Malcolm Campbell. In the cross-petition of Lady Campbell she named an intervener. The result of the proceedings was that Sir Malcolm was granted a decree, the petition of Lady Campbell was dismissed, and the intervener was dismissed from the suit. An order was made that Lady Campbell should pay the costs of the intervener, and there was an order that Sir Malcolm Campbell should pay the costs of Lady Campbell. An appeal was brought before the Court of Appeal, but the appeal was abandoned, and an order was made that Lady Campbell should pay to Sir Malcolm the costs of that appeal. An application was then made to the Court of Appeal on behalf of Sir Malcolm for an order that he might set off those costs against the costs which he had been ordered to pay to Lady Campbell. At that time, the appellant had ceased to be Lady Campbell's solicitor. The Court of Appeal refused to make an order of set-off, and the appellant was left in the belief that he had the ordinary lien of a solicitor for his costs. Sir Malcolm Campbell took an assignment of the intervener's claim. The appellant issued a summons for a charging order upon the costs which Sir Malcolm Campbell had been ordered to pay to Lady Campbell. The wording of the summons was wide enough to carry an application under the Solicitors Act, 1932, s. 69, or at common law. At the hearing before the registrar, it was contended that there could be A no charging order upon costs, as they were not property recovered or preserved, and that, even if costs were property upon which a solicitor's lien could attach, the claim of Sir Malcolm Campbell against Lady Campbell, which had become vested in him by reason of the assignment to him of the intervener's order for costs, entitled him to set off the claim B against the liability to pay Lady Campbell's costs, and that the one absorbed the other. The registrar decided accordingly, and the judge affirmed the decision of the registrar on the grounds that there could be no charging order upon costs and that there was no fund.

Constantine Gallop for the appellant. C

A. Melford Stevenson for the respondent.

Sir Wilfrid Greene, M.R. [delivering the judgment of the court]: By the decree *nisi* made upon the petition of the respondent to this appeal for the dissolution of his marriage, he was ordered in the usual form to D pay his wife's taxed costs. The intervener in the wife's cross-petition had previously been dismissed from the suit with costs against the wife. The wife's costs were taxed at the sum of £826 15*s*. 10*d*., to meet which there was a sum of £550 in court. This sum was paid out to the appellant, who acted as the wife's solicitor in the proceedings, leaving a balance of E £276 15*s*. 10*d*. unprovided for. On July 31, 1940, an order was made for payment of this balance by the respondent to the appellant, but it is not, and could not be, suggested that this order gave the appellant personally any right to recover it from the respondent. The costs of the intervener were taxed at the sum of £302 1*s*. 11*d*. By a document in writing dated F July 3, 1940, the intervener assigned this sum to the respondent in consideration of the payment by him to her of a like sum in cash.

The application out of which this appeal arises was a summons taken out by the appellant on Aug. 23, 1940, for an order that the appellant should have a charge to the extent of £276 15*s*. 10*d*. upon the costs ordered G to be paid by the respondent to his wife. The wife, although a respondent to the application, has not appeared at any stage. The summons does not refer in terms to the Solicitors Act, 1932, s. 69, and it is not disputed that its language is wide enough to cover an application for relief at common law and is not limited to a charging order under the section. H Accordingly, it is unnecessary to discuss the question whether the wife's costs ordered to be paid by the respondent are "property recovered or preserved" within the meaning of sect. 69, since it is well-settled that such costs can be made the subject of a charge in favour of the solicitor under the inherent jurisdiction of the court: *Ex p. Rhodes* (1), at p. 542, *Ex p. Bryant* (2) and *O'Brien* v. *Lewis* (3). Both before the registrar and on appeal before Henn Collins, J., and, indeed, before us, the case for the appellant was based on the Solicitors Act, 1932, s. 69. Both the registrar and Henn Collins, J., took the view that these costs were not "property recovered or preserved" within the meaning of the section. It must not be taken that we agree with this view, which at first sight seems impossible to reconcile with the decision of this court in *Dallow* v. *Garrold, Ex p. Adams* (4), but, as the point was not fully argued, we do not think it right to express a concluded opinion upon it. It was only in this court that it was pointed out by the court itself that a claim could be made at common law for a charging order on a sum ordered to be paid for costs, and counsel for the respondent agreed that such a claim could be maintained irrespective of sect. 69.

The only other point which remains to be mentioned relates to the respondent's cross-claim against the wife in respect of the intervener's costs. Counsel for the respondent did not rely on this cross-claim as of itself depriving the appellant of his right to relief, and, accordingly, it is not necessary to discuss that aspect of the matter. He did, however, rely on the cross-claim as being a consideration to be taken into account in the exercise of the court's discretion, and he argued that the court ought not to make an order which might result in the levying of cross-executions. This argument can be dealt with quite shortly. The fact that there are cross-liabilities between the respondent and his divorced wife is due entirely to the action of the respondent himself, which may or may not have been taken for the very purpose of defeating the appellant's claim to a lien. Moreover, as far as execution is concerned, the argument has no substance, since it is in evidence that Lady Campbell has no means of her own. Even if she had had means, however, our opinion would have been the same. We see no reason why the discretion of the court should not be exercised in favour of the appellant. The appeal will be allowed. There will be a declaration that the appellant is entitled to a charge to the extent of £276 15*s.* 10*d.* upon the costs ordered to be paid by the respondent by the order of July 31, 1940.

Appeal allowed with costs.

Solicitors: *L. A. Hart* (for the appellant); *Kenneth Brown, Baker, Baker* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Dictum of DU PARCQ, L.J., at pp. 284, 285, *applied.* HARRISON *v.* NAT. COAL BOARD. [1949] 2 All E.R. 58.

Distinguished. HARRISON *v.* NATIONAL COAL BOARD. [1950] 1 All E.R. 171.

YELLAND AND OTHERS *v.* POWELL DUFFRYN ASSOCIATED COLLIERIES, LTD.

[COURT OF APPEAL (MacKinnon, Luxmoore and du Parcq, L.JJ.), **November 20, 21, 22, 25, December 10, 1940.**]

Mines—Coal mine—Statutory regulation—Breach of regulation by employee—Deliberate breach—Civil liability of mine-owners—"Reasonably practicable to avoid or prevent breach"—Coal Mines Act, 1911 (*c.* 20), *ss.* 29. 102 (1), (3), (8).

Negligence—Personal injuries—Damages under Fatal Accidents Acts—Overlapping of damages—Law Reform (*Miscellaneous Provisions*) *Act,* 1934 (*c.* 41), *s.* 1 (5).

As a result of an explosion in a coal mine belonging to the defendants, four men were killed and two others injured. In actions brought by the personal representatives of the men killed, both under the Fatal Accidents Act, 1846, and under the Law Reform (Miscellaneous Provisions) Act, 1934, it was found as a fact that the explosion was caused by the negligence of one of the deceased. He had attempted to test an electric cable by a method which produced a spark, and which was, therefore, negligent. This method of testing was also contrary to the statutory regulations then in force, and it was proved that this was a deliberate act on the part of this deceased and that proper testing apparatus was available. The trial judge, however, found that the defendants failed to provide a proper system of ventilation, but the Court of Appeal held that the evidence did not support that finding. The trial judge also held that there was a breach of statutory duty by the electrician who tested the cable. The defendants contended that it was not reasonably practicable to prevent the breach and that they were excused under the provisions of the Coal Mines Act, 1911, s. 108 (8). It was further argued that, if the plaintiffs were entitled to recover, then, upon the proper construction of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, no allowance should be made in assessing damages under the Fatal Accidents Act, 1846, in respect of any damages awarded under the 1934 Act:—

HELD: (i) the Coal Mines Act, 1911, s. 102 (1), (3), has reference only to criminal liability and, therefore, had no application to this case.

(ii) as the electrician's act was that of the defendants, they could not say that it was not reasonably practicable to avoid or prevent the breach, and the defence under the Coal Mines Act, 1911, s. 102 (8) failed.

(iii) in assessing damages under the Fatal Accidents Act, 1846, damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, must be taken into account in the case of dependants who will benefit under the latter Act.

[**EDITORIAL NOTE.** The question raised in the appeal in this case is of much more restricted interest than that in the cross-appeal. The former is of interest only to persons in the coal-mining industry, and the principal difficulty in its solution lay in the application to the Coal Mines Act, 1911, of certain decisions in the House of Lords under the earlier Act of 1887. The cross-appeal, however, is of the utmost importance and of general interest. It was stated in *Rose* v. *Ford* (10), that there might be some overlapping in the damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, and those awarded under the Fatal Accidents Act, 1846. In *Feay* v. *Barnwell* (9), decided in December, 1937, this suggestion was considered and it was decided that the award under the 1934 Act, subject to a deduction for administration expenses, must be deducted from that under the Fatal Accidents Act. Since that decision this rule has been acted upon, but, in the cross-appeal in the present case, it was alleged to be contrary to the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (5). That subsection states that the rights conferred by the 1934 Act are in addition to and not in derogation of any rights conferred by the Fatal Accident Acts. The Lords Justices are unanimous in their view that the decision in *Feay* v. *Barnwell* (9), was correct, but it is not clear that their reasons are quite identical. MacKinnon, L.J., seems to rely purely upon the construction of the subsection. Luxmoore, L.J., observes that the beneficiaries who ultimately receive the damages awarded under the 1934 Act derive their title to them from the will of the deceased or under the law of intestacy, and not from the Act of 1934. du Parcq, L.J., emphasises the well-known rule that, in the assessment of damages under the Fatal Accidents Act, credit must always be given for any benefit received by reason of the death of the deceased and the ultimate figure arrived by a process of set off. While these differences may be more apparent than real, the judgment of Luxmoore, L.J., clearly shows that it may well happen that a judge, having equated incommensurables and assessed damages for loss of expectation of life, may have to construe a really difficult will in order to arrive at the amount to be awarded under the Fatal Accidents Act.

As to Defence to Civil Action for Branch of Statutory Duty, see HALSBURY, Hailsham Edn., Vol. 34, p. 824, para. 1689 ; and for Cases, see DIGEST, Vol. 34, p. 746, Nos. 1206-1210.

As to Damages under the Fatal Accidents Acts, see HALSBURY, Hailsham Edn., Vol. 23, p. 690, para. 975 ; and for Cases, see DIGEST, Vol. 36, pp. 139-141, Nos. 933-944.]

Cases referred to :

(1) *David* v. *Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146 ; 34 Digest 219, *1816* ; 78 L.J.K.B. 659 ; 100 L.T. 678 ; *on appeal*, [1910] A.C. 74.

(2) *Groves* v. *Wimborne (Lord)*, [1898] 2 Q.B. 402 ; 34 Digest 218, *1815* ; 67 L.J.Q.B. 862 ; 79 L.T. 284.

(3) *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan*, [1934] A.C.1 ; Digest Supp. ; 102 L.J.P.C. 123 ; 149 L.T. 526 ; 26 B.W.C.C. 463.

(4) *Butler (or Black)* v. *Fife Coal Co., Ltd.*, [1912] A.C. 149 ; 34 Digest 218, *1809* ; 81 L.J.P.C. 97 ; 106 L.T. 161 ; 5 B.W.C.C. 217.

(5) *Watkins* v. *Naval Colliery Co. (1897), Ltd.*, [1912] A.C. 693 ; 34 Digest 741, *1173* ; 81 L.J.K.B. 1056 ; 107 L.T. 321.

(6) *Pym* v. *Great Northern Ry. Co.* (1863), 4 B. & S. 396 ; 36 Digest 129, *859* ; 32 L.J.Q.B. 377 ; 8 L.T. 734.

(7) *Grand Trunk Ry. Co. of Canada* v. *Jennings* (1888), 13 App. Cas. 800 ; 36 Digest 139, *936* ; 58 L.J.P.C. 1 ; 59 L.T. 679.

(8) *Hicks* v. *Newport, Abergavenny & Hereford Ry. Co.* (1857), 4 B. & S. 403, n. ; 36 Digest 139, *935*.

(9) *Feay* v. *Barnwell*, [1938] 1 All E.R. 31 ; Digest Supp.

(10) *Rose* v. *Ford*, [1937] A.C. 826 ; [1937] 3 All E.R. 359 ; Digest Supp. ; 106 L.J.K.B. 576 ; 157 L.T. 174.

(11) *Duckworth* v. *Johnson* (1859), 4 H. & N. 653 ; 36 Digest 132, *873* ; 29 L.J.Ex. 25 ; 33 L.T.O.S. 274.

(12) *Griffiths* v. *Dudley (Earl)* (1882), 9 Q.B.D. 357 ; 36 Digest 136, *903* ; 51 L.J.Q.B. 543 ; 47 L.T. 10.

(13) *Read* v. *Great Eastern Ry. Co.* (1868), L.R. 3 Q.B. 555 ; 36 Digest 136, *902* ; 37 L.J.Q.B. 278 ; 18 L.T. 822.

(14) *British Columbia Electric Ry. Co., Ltd.* v. *Gentile*, [1914] A.C. 1034 ; 36 Digest 131, case *l*.

Appeal and Cross-Appeal from a judgment of Lewis, J., dated Mar.. 19, 1940, at the Glamorgan Assizes. The defendants appealed upon the question of liability. The cross-appeal by the plaintiffs raised the question whether the damages awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, should be set off against those awarded under the Fatal Accidents Act, 1846. The hearing of the cross-appeal was adjourned pending the delivery of the opinions of the House of Lords in the appeal in *Benham* v. *Gambling*, [1941] 1 All E.R. 7.

At about 6 a.m. on Sept. 6, 1938, there was an explosion in the defendants' mine, and, as a result of the explosion, Yelland and three other men lost their lives, while two others were injured. The dependants of the men killed brought actions for damages, afterwards consolidated, under both the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934. The 4 deceased workmen were employed by the defendant company, Yelland and Davies as coal-cutters, Williams as a collier, and Jones as an assistant electrician. On Sept. 6, 1938, Yelland and Davies, who were cutting coal at another face on the night shift had orders that, when they had finished there, they were to go to a face between two roads known as D. O. Williams' road and Ron Gain's road, respectively, to work a coal-cutter left there unused since 9.30 p.m. the previous evening. During the night this coal-cutter broke down, and the assistant electrician, Jones, was called to attend to the breakdown. While he was testing the cable, there was a sudden explosion, which resulted in the death of Yelland and Jones and two other men. Later in the day the manager and Captain Sims Rees, an inspector of mines, made an examination of the scene of the accident, and found, among other things, electricians' tools, but no signs of violence of an explosion. They were careful not to touch any of the electrical gear. The next day, the manager, Captain Sims Rees and one Horsley, examined the scene of the accident again. No fault was found in the end box of the cable, which was then dismantled in the presence of Horsley and there was no gas. After a minute search, however, broken pieces of electric light bulbs were found, although no flex of any sort or kind was found.

The judge found as a fact that he was not satisfied that there was any opening of certain double doors, alleged improperly to have been left open by some other workman or workmen in the colliery, which had anything to do with the explosion, or interruption of the ventilation. He also found himself unable to accept the plaintiffs' allegations of mismanagement of the mine and breaches of statutory duty by the defendants. About a month before the accident, an inspector of mines had inspected this mine and issued a good report. The judge also found as a fact that the defendants did all they could to stop the improper method of testing the cable used on the occasion of this accident, and that they did not neglect the brattice sheets, which guided to the desired places the currect of air pumped into the mine, but did their best to keep them in good order. Those brattice sheets, he found, were in good order at the time of the explosion. As to the gas present, the judge said that the plaintiffs had not satisfied him that there was gas there

from 9.30 p.m., when the cutter was last used, until 6 a.m. the next morning, or that the gas there was the result of the use of the cutter on the day before. He was satisfied that on Sept. 8 or Sept. 9, when an inspection took place, there was a crack in the floor through which the
A gas came up, and that there was undoubtedly no adequate amount of ventilation to render that gas harmless. He therefore found the defendants guilty of a breach of statutory duty. He found that the real cause of the accident was the action of Jones in applying a spark without cutting off the cable and in failing to obey the regulations, and that
B Jones was responsible, therefore, for a breach of statutory duty. In Jones' case, therefore, he was satisfied that the defendants were entitled to succeed. Since it was the negligence of Jones, a servant of the defendants, which caused the death of the other three plaintiffs, the defendants were liable to those other three for the breach of statutory
C duty on the part of their servant.

In assessing the damages, the judge deducted the sum awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, from the amount awarded under the Fatal Accidents Act, 1846.

A. S. Comyns Carr, K.C., *Joshua Davies, K.C.*, and *Rowe Harding*
D (for *Edmund Davies* on war service), for the appellants.

Gilbert J. Paull, K.C., and *F. D. L. McIntyre* (for *W. Griffith Williams* on war service), for the respondents.

MacKinnon, L.J.: The facts in this case were very clearly and
E carefully set forth in his judgment by Lewis, J., with an elaborate analysis of the evidence. Some suggestion was made for the respondents that his conclusion on one point was not in accordance with the weight of the evidence, but it was not a strenuous contention. I am content to adopt in their entirety the findings of fact of the judge. This means
F that the disaster which caused the death of these men was due to one cause, and to one cause only. The assistant engineer Jones, instead of cutting off the current from the faulty cable and using the negger to test, left the current on and used a piece of flex with one or two bulbs upon it. The result was a spark which ignited explosive gas and caused
G the disaster. How the gas got there (apparently it was on the floor) is mysterious. The judge accepts the theory that it came from a crack in the floor, and came in a sudden gush at the moment when, unhappily, the action of Jones caused the spark. That may well be the most reasonable explanation of the mystery. However, I do not think it is,
H or that it was for the judge, essential to come to a conclusion as to the source of the gas. I understand the judge to find that for all normal requirements the ventilation system was adequate, and that it was being properly worked. The disaster happened because there was a sudden and abnormal emission of gas at the moment when Jones negligently, and in defiance of the orders of his superiors, used the flex and bulbs and created the spark.

When the judge leaves the facts and comes to consider the law, I do not find that his reasoning is quite so clear. I am not surprised at this, for the legal problem involves obscure questions, and in particular the interpretation of the exceedingly difficult and complicated Coal Mines Act, 1911. That task of interpretation is not made easier by the existence of a number of authorities decided about the Coal Mines Regulation Act, 1887, an Act which is almost as complicated as the Coal Mines Act, 1911, but is couched in different terms. Some of these authorities are reported decisions of the House of Lords. I regret that one of them at least is embarrassing rather than helpful. In *David* v. *Britannic Merthyr Coal Co.* (1), the Court of Appeal, with elaborate judgments, ordered a new trial. The House of Lords affirmed their order, but LORD HALSBURY and LORD GORELL both said that they could not agree with some of the reasoning of the judges in the Court of Appeal. It would have been more helpful to their equally fallible successors if their Lordships had explained the particular errors into which this court then fell.

I start, as I think LEWIS, J., did, with the proposition derived from *Groves* v. *Wimborne* (*Lord*) (2) that, when a statute imposes a duty on the owner of a factory, for example, to fence machinery, and imposes penalties for its breach, then, if the failure to fulfil the duty causes hurt to a workman, (*a*) the workman has a civil claim for damages, and (*b*) to such a claim the master cannot rely on the doctrine of common employment as a defence. LEWIS, J., seems to have been of opinion that there was a breach of the statutory duty as to ventilation imposed by sect. 29 of this Act of 1911. The judge has found that the system of ventilation was adequate for all normal requirements, and was properly worked, but in fact it was not adequate to disperse this abnormal, sudden and incalculable emission of gas. Therefore, in fact, on this occasion it turned out to be inadequate. I do not think that I agree with this reasoning. However, I also think that it is unnecessary to discuss this particular aspect of the case, for, as it seems to me, there was a breach of another statutory duty, and the result of that is sufficient to make the defendants liable and to justify the judgment against them below.

The defendants, the owners of the mine, are a limited company. The company can only act by its servants and agents, and can only carry out the duties imposed on the owners of a coal-mine by this Act of 1911 by its servants or agents. As to electrical apparatus, by sect. 60 (4) the use of electricity in a mine is to be subject to the General Regulations, and the duties imposed by those General Regulations, are, therefore, statutory duties. The defendant company could only perform those duties by its electrical staff—that is, by Marsh, the chief electrician, and by Jones, the assistant electrician. In what Jones is found to have done I think he was clearly breaking regs. 131 (e) and 132 (iii). There was, therefore, a breach by Jones of statutory duties imposed upon the defendants and their servants, and it was this breach which caused the disaster from which the victims of it suffered.

Prima facie, under the principle of *Groves* v. *Wimborne* (*Lord*) (2), this gives the plaintiffs a cause of action against the defendant company. It remains to consider whether the defendant company have any defence to that *prima facie* claim. Under the terms of this Act of 1911, I think A that the only defence can be under sect. 102 (8), which provides as follows :

> . . . the owner of a mine shall not be liable to an action for damages as for breach of a statutory duty . . . if it is shown that it was not reasonably practicable to avoid or prevent the breach.

If, as I think, the breach of the statutory duty was committed by Jones, clearly it cannot be said that "it was not reasonably practicable" B for Jones "to avoid or prevent the breach." He acted as he did deliberately, and must have known that he was breaking the regulations.

The truth is that the possible liability of the owners of a coal-mine under this Act is imposed in very stringent terms. I imagine that, under sect. 102 (8), they might escape the consequences of a breach of reg. C 131 (*e*) if they could show that Marsh or Jones had duly made the current dead and that it was switched on by some irresponsible person who had no concern with electrical affairs, and was wickedly interfering, or if some unexpected fall of stone had knocked a switch and turned on the current. However, when the breach of the statute has been committed D by their servant specially delegated to carry out the regulations, it seems to me quite impossible for the owners to contend that "it was not reasonably practicable to avoid or prevent" that breach. This language, it may be observed, is very different from that of the provision in sect. 102 (3), where, in regard to penalties under sect. 90, it is E provided that an owner may escape from a penalty :

> . . . if he proves that the contravention was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision.

I may add that this conclusion seems to be in accordance with the opinion F of Lord Wright in *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan* (3), at pp. 22, 23.

In the result, I think that Lewis, J., came to a correct conclusion, and that this appeal must be dismissed with costs. There is a cross-appeal as to the amount of the damages awarded. As that had nothing G in common with the appeal, we arranged to postpone the hearing of it until we had disposed of the difficult questions raised by the appeal.

Luxmoore, L.J. : I have had the privilege of reading and considering the judgment which has just been delivered by MacKinnon, L.J., H and also that which is about to be delivered by du Parcq, L.J., and I find myself in complete agreement with the conclusion at which they have arrived and with the several reasons stated by them for that conclusion. I do not think that it would serve any useful purpose to attempt to restate the same reasons in less happy language, and I have, therefore, refrained from writing a separate judgment. I agree with the order proposed by MacKinnon, L.J.

du Parcq, L.J.: The facts of this case have been found with great care and precision by Lewis, J., and I am satisfied that it would be wrong to disturb his findings. I cannot agree, however, with what I understand to be the judge's opinion that, on the facts as he found them, the defendants were shown to have been guilty of a breach of the duty A imposed upon them by the Coal Mines Act, 1911, s. 29. In my view the requirements of that section were satisfied. The amount of ventilation produced was adequate to dilute inflammable gases to the extent required by the section, and the intake airways were "normally kept free from inflammable gas." The cause of the explosion which killed B and injured men working in the mine was not any inadequacy of ventilation, but was an act of negligence which caused the sudden ignition of inflammable gas. There is nothing to suggest, nor does the judge find, that any amount of ventilation in the ordinary sense of that word would have prevented the disaster, and, therefore, I am of opinion that the C judge's reason for deciding in the respondents' favour was not satisfactory. The question remains whether the decision can be supported on other grounds.

It is beyond controversy that the cause of the disaster was a negligent act on the part of one of the defendants' servants. It was an act for D which, but for the doctrine of common employment, the defendants would clearly be liable. That doctrine affords them a defence to the claims in so far as they are based solely on the common law. It is plain, however—and, indeed, it is not in dispute—that the act of negligence was itself a breach of statutory duty. Sect. 60 (4) of the Act E provides as follows:

> . . . the use of electricity in any mine shall be subject to general regulations under this Act.

Such regulations have been duly made under sect. 86 of the Act, and have effect as if enacted in the Act. It is now admitted that the assis- F tant electrician whose negligence caused the accident did a thing which constituted a breach of reg. 131 (*e*), but the mere fact that the negligence of a fellow-servant was a breach of a statutory obligation imposed upon him is not sufficient to deprive the master of the benefit of the doctrine of common employment. The first question upon which the G decision of this appeal depends is whether or not, in the circumstances of the case, and on the true construction of the statute, there was a breach of statutory duty by the defendants, the mine-owners. If there was, the only possible defence open to the defendants are those said to be provided by sect. 90 and sect. 102 of the Act. Reg. 117, which must H be read as if it were part of the Act, provides as follows:

> It shall be the duty of the mine-owner, agent and manager to comply with and enforce the following regulations, and it shall be the duty of all workmen and persons employed to conduct their work in accordance with the regulations . . .

I do not accept the contention of the respondents that there is necessarily a breach by the mine-owner of his duty to "enforce" a regulation on every occasion on which a workman or other person employed is guilty of breaking it. Magistrates enforce the law when they punish the offender. The policeman enforces the law when he apprehends the delinquent. It would be an abuse of language to say that every contravention of the regulations on the part of a workman was a proof of the mine-owner's breach of his duty to enforce it. I do not think, therefore, that in this case the respondents can properly rely on that part of reg. 117 which imposes on the mine-owner a duty to "enforce" the regulations. The mine-owner's duty, however, is not merely "to enforce." It is "to comply with and enforce." If it is right to say that the defendants failed to comply with reg. 132 (*e*), and not merely that one of their workmen failed to comply with it, then the defendants were guilty, subject to any defence they may have under sect. 90 and sect. 102 of a breach of statutory duty.

While it is true that an employer is not necessarily guilty of a breach of statutory duty because a servant employed by him commits such a breach in the course of his employment, it is certainly no less true that there are cases in which the servant's breach of duty may properly be attributed to the master. A statute may be so framed as to make the master vicariously responsible, either civilly or criminally or both civilly and criminally. Moreover the servant may be the agent to whom the performance of the duty is delegated, and in that case the principle expressed in the maxim *qui facit per alium facit per se* is operative. If the employer entrusts the performance of a duty to another, he will be liable for its non-performance or breach by that other unless there is something in the statute to exonerate him. It is plain that the Act imposes a duty on the mine-owner himself to comply with some at least of the regulations as to electricity. Otherwise reg. 117 would limit the duty of the mine-owner to the "enforcing" of the regulations. The definition section (sect. 122) includes a body corporate in the definition "owner." Even if the mine-owner were a natural person, and not, as in this case, a limited liability company, he would hardly be able to comply with any of the regulations, and certainly would be unable to comply with them all, in the sense of himself carrying them out, or even in the sense of constantly seeing to it that they were carried out. Indeed, this task, difficult as it would be for physical reasons, is made impossible in the case of an owner who is not himself qualified to be the manager of the mine by the provisions of sect. 2 (1), which forbid him to take any part in the technical management of the mine. The legislature has indeed recognised that, in certain cases, it would be unfair to subject the mine-owner to a penalty for failing to comply with rules the due observance of which he must perforce leave to agents, but, subject to the provisions of sect. 102 (1), to which it will be necessary for me to refer again, it is expressly enacted by sect. 102 (2) as follows:

> . . . it shall not be any defence in any proceedings brought against the owner . . . of a mine. . . . that a manager of the mine has been appointed in accordance with this Act.

It is not necessary to decide whether the owner is bound to " comply with " every one of the regulations to which reg. 117 refers. It may be that there are some with which, from their very nature, it is impossible that the owner should comply, and that his only duty with regard to these is to " enforce " them. Further, it must, I think, be true to say that a breach of duty by some person who has not been entrusted by the mine-owner with the performance of the duty on his behalf is no evidence of a failure by the owner to comply with the Act. I find no difficulty, however, in holding that the mine-owner is under an obligation to " comply with " reg. 131 (*e*), and that in the present case the defendants have failed in that duty. The person immediately responsible for the performance of this obligation is the electrician, or assistant electrician, who has to be appointed by the manager (regs. 118 and 131 (*b*)). His duties are set out in reg. 131 (*c*), and, in my opinion, he must be regarded as the mine-owner's agent to perform those duties, and as the agent through whom the owner must act, and in this case did act. The mine-owner, through the manager, has entrusted him with the performance of the duty. It follows that the law attributes to the owner his acts and omissions, and regards them as the mine-owner's own acts and omissions, for which he is directly responsible. Proof of the facts which were established in this case in my opinion fully supported the pleaded allegation that "the defendants failed to comply with the Electricity Regulations."

The defendants, however, rely on sect. 90 of the Act. It is impossible, in my view, to construe sect. 90 as meaning that the owner is never to be found guilty of non-compliance with a regulation if he can prove that he has taken all reasonable means to prevent such non-compliance. This would be to say in effect that the owner was liable only for a failure to " enforce " the regulations, in the sense in which I have said that, in my opinion, this word should be construed, whereas reg. 117 puts upon him a duty both to comply with them and to enforce them. In my view, the owner who has failed to comply with reg. 117, being a person bound to observe the regulations, is guilty of an offence, and the defence which sect. 90 allows is not open to him. He can never avail himself of that defence when the breach of duty in question is that of an agent through whom he is acting, or, in other words, his own breach in contemplation of law.

The defences founded on sect. 102 (1), (3), (8), have now to be considered. If sect. 102 is read as a whole, it seems to me to be clear that the legislature is drawing a distinction between civil and criminal liability. The Act has already imposed statutory obligations on the mine-owner, and, in order to establish liability in a civil action, it is enough to show the existence of a statutory duty. If that is shown, it is immaterial that no penalty is imposed for the breach : *per* A. L. SMITH, L.J., in *Groves* v. *Wimborne* (*Lord*) (2), at p. 407. Apart from authority, I should have thought it plain that, whenever a duty has been imposed on an owner, subsects. (1) and (2) merely free him from the penal consequences which, but for their provisions, would follow the breach, and that he must look to subsect. (8) for relief in civil proceedings. It is contended, however, that we are bound by authority to hold that (as it was put by counsel for the appellants) " any defence which is open in criminal proceedings is also a defence in a civil action." In support of this proposition, three decisions of the House of Lords were cited —namely, *David* v. *Britannic Merthyr Coal Co.* (1), *Butler* (*or Black*) v. *Fife Coal Co., Ltd.* (4) and *Watkins* v. *Naval Colliery Co.* (*1897*), *Ltd.* (5). In each of these cases, the House of Lords was construing, not the Act of 1911, but the Coal Mines Regulation Act, 1887. The material sections of the latter Act were sects. 49 and 50. Sect. 50 is in much the same terms as those of sect. 90 of the Act of 1911. It is plain that the duty imposed on the mine-owner by these sections was a qualified duty. Rules were to be observed " so far as reasonably practicable." Moreover, the owner was to be held guilty if any other person whosoever contravened the rules, subject to the proviso that he was not then to be found guilty if he could prove that he had taken all reasonable means to prevent the contravention. Counsel for the appellants placed great reliance on the words of Lord Atkinson in *Watkins'* case (5), at p. 705, where, construing sect. 50 as it applied to an owner who was made liable for the acts of others, he said that the words at the end of the section provided a defence to criminal liability, adding, at p. 705:

> And if it be a defence against criminal liability it is clearly, I think, a matter of defence against civil responsibility also.

It is plain, however, that Lord Atkinson was not laying down any general rule, any more than was Lord Halsbury in *David's* case (1). He was pointing out what can hardly be doubted—namely, that the sections then in question imposed, in certain circumstances, a qualified and not an absolute duty, and that this was true as well of civil as of criminal liability. The opinion of Lord Kinnear in *Butler's* case (4), so far as this particular point is concerned, was to the same effect. I find nothing in the decisions of the House of Lords to compel me to reject the construction which, apart from authority, would appear to be plainly correct, and I have accordingly come to the conclusion that sect. 102 (1), (3), affords no defence in this case. I may add that I am not satisfied that, on the true construction of subsect. (1), it can be said that the defendant company has proved that it

> . . . was not in the habit of taking and did not in respect of the matters in question take any part in the management of the mine.

I prefer to express no opinion on this point, which seems to me to involve questions of some difficulty, especially in a case where the defendants are a body corporate.

The only remaining question is whether the defendants have shown, in the words of sect. 102 (8),

> . . . that it was not reasonably practicable to avoid or prevent the breach.

On the view which I take, and have endeavoured to express, it is plain that they have not. If the assistant electrician's act was the defendant company's act, and if his breach of duty was the company's breach of duty, clearly the company cannot say that it was not reasonably practicable to avoid or prevent it. The respondents seek to construe the section in such a sense that the defendants would be relieved of civil liability by showing that their electrician acted without their knowledge and contrary to their instructions. In my opinion, this is an impossible construction. In order to escape liability, it would be necessary for the mine-owner to show that it was not reasonably practicable either for him or for his agent, the assistant electrician, to avoid or prevent the breach, and it is clear that, if the assistant electrician had not himself disregarded the regulations, the disaster would not have happened. I am of opinion, therefore, that sect. 102 (8) has no application to this case.

On these grounds, I have come to the conclusion that the appellants, having been guilty of a breach of statutory duty, cannot rely on the defence of common employment, and that none of the other suggested defences will avail them. I am happy to think that the construction which this court has put upon the material sections of the Act appears to be in accordance with the general policy of the Act. The construction for which the appellants contended would, as it seems to me, produce a result which it would be hard to believe that Parliament intended. The theory behind the doctrine of common employment is that a workman impliedly contracts to take the risk of a fellow-servant's negligence. It would be difficult indeed to imply in the contract of service a term that the workman must take the risk of any neglect on the part of an agent appointed to act in the master's place for the purpose of carrying out statutory provisions made for the workman's safety. Moreover, it would be unfortunate, to say the least of it, if a workman's right to recover in such a case as this were to depend on the ability of the company to prove that it did not concern itself with the management of the mine and left everything to the manager, and if proof of these facts were to deprive him of that right. It is, however, an intelligible provision that in civil proceedings it should be open to the mine-owner to prove by way of defence that the breach of statutory duty was one which it was not reasonably practicable to avoid or prevent. Some unforeseen accident may put it out of the power of those in responsible positions to comply with the Act, or their precautions may be rendered futile by the careless or wrongful act of a workman or a stranger. The legislature has been at pains to distinguish between civil and criminal liability, and it is not for the courts to seek, in decisions dealing with a repealed Act drafted on a different plan and in different language, grounds for ignoring the distinction which Parliament has made. I agree that the appeal should be dismissed with costs.

The cross-appeal of the respondents, the plaintiffs in the action, which had reference to the overlapping of damages awarded under the Fatal Accidents Act, 1846 and under the Law Reform (Miscellaneous Provisions) Act, 1934, was heard on Jan. 14, 15, 1941, and judgment given on Feb. 12, 1941, the hearing having been adjourned until the decision of the House of Lords in *Benham* v. *Gambling* had been given. The opinions given in that case, however, had no bearing on the subject of the cross-appeal.

MacKinnon, L.J.: The claim was for damages both under the Fatal Accidents Act, 1846, and under the Law Reform (Miscellaneous Provisions) Act, 1934. The judge has assessed damages under each, but, in assessing them under the Act of 1846, he has taken account of the benefit which one of the dependants (in each case the widow) is to derive under the Act of 1934, and has *pro tanto* reduced the damages under the Act of 1846. Counsel for the respondents contends that that is erroneous, and that, by virtue of a provision in the Act of 1934, no such reduction ought to be made.

Under the Fatal Accidents Act, 1846, commonly called Lord Campbell's Act, an action can be brought by the personal representative of a deceased against the defendant responsible for his death to recover the pecuniary loss resulting from his death to his wife or other dependants. It is well settled that such recovery is strictly limited to pecuniary injury from the death. If, for example, the deceased was childless, and supported his wife from his income from investments, and if by his will he left all he possessed to the wife, she clearly would have no claim under the Act of 1846. Similarly, until the amendment by the Fatal Accidents (Damages) Act, 1908, if the dependent widow got the benefit of a policy of life or accident insurance, that was a benefit to be taken into account in estimating her claim for pecuniary loss by the husband's death under the Act of 1846. If, under the Law Reform (Miscellaneous Provisions) Act, 1934, a sum is recoverable by the widow, it would seem clear that this sum ought to be taken into account in estimating, under the Act of 1846, her pecuniary loss as a dependant by the husband's death. This is what the judge has done, and what counsel for the respondents says that he ought not to have done. That contention depends solely upon the provision in sect. 1 (5) of the Act of 1934:

> The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908. . . .

In fact, in this case the widow has claimed under both Acts, and has been given damages under both Acts. Therefore, her claim under the Act of 1934 has been allowed in addition to her claim under the Act of 1846, and has not been allowed to derogate from her right to claim under the Act of 1846. Counsel for the respondents says, however, that the words "in addition to and not in derogation of the rights" under the Act of

1846 mean that anything recovered under the 1934 Act shall not be allowed to diminish the full amount of damages which would be recoverable under the 1846 Act if the Act of 1934 had never been passed. I think that this argument is unsound. The clause refers to "the rights" under the Act of 1846. Such "rights" seem to be only the right of a personal representative to claim damages. The clause says nothing about the measure of damages so recoverable. If the legislature had meant to enact that the amount of damages under the 1846 Act should not be affected by anything recovered under the 1934 Act, they had the very pertinent precedent of the Fatal Accidents (Damages) Act, 1908. Sect. 1 of that Act simply and clearly provides:

> In assessing damages . . . under the Fatal Accidents Act, 1846 . . . there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance. . . .

I think that it is impossible to hold that the words "The rights conferred by this Act . . . shall be in addition to and not in derogation of any rights conferred by" the Act of 1846 are equivalent to: "In assessing damages under the Act of 1846, any sum recovered under this Act shall not be taken into account." The truth is, as far as I can see, that "and not in derogation of" means nothing more than "shall be in addition to." I have no idea why Parliament, or the draftsman, indulged in this unnecessary tautology, but I am quite satisfied that "not in derogation of" cannot bear the meaning suggested for the respondents. Therefore, the cross-appeal fails.

Luxmoore, L.J.: In fixing the damages in the case of Davies, **Lewis, J.** said:

> I have to bear in mind that Mrs. Davies is not entitled to damages twice over. She is an administratrix, and, as administratrix and by virtue of the provisions of the Law Reform Act, she became entitled by her husband's death to such sum as the court may say is the amount of the value of his expectation of life. Therefore, she is not entitled to the same amount under the Fatal Accidents Act as she would have been if she had not benefited by virtue of the Law Reform (Miscellaneous Provisions) Act. I think that the sum to award her under the Fatal Accidents Act is the sum of £5. I will award the elder child £100 and the younger child £150. The agreed funeral expenses are, I understand, £14. I will also award the widow £700 under the Law Reform (Miscellaneous Provisions) Act.

In fixing the damages in the case of Williams, **Lewis, J.** said:

> Again, in this case the same remarks apply with regard to the recovery of damages by the widow as administratrix. She gets an amount awarded to the estate under the Law Reform (Miscellaneous Provisions) Act. With regard to this case, I think that the proper amount to award the widow under the Fatal Accidents Act is £5 and the proper amount to award to Margaret, who is aged 14, is £50, to Bronwen, who is aged 11, £75, and to Garfield, who is aged 8 years, £100. In addition to that, the estate is entitled to £15 funeral expenses and £250 for the loss of expectation of life. That makes a total of £495 in that case.

It will be observed that in each case the damages awarded to the widow of the deceased man under the Fatal Accidents Acts are stated by the judge to be £5, but the judge has made it clear that in the case of Davies the total amount he would have awarded to the widow under that Act, if it had not been for his award under the Law Reform Act, would have been £705, and that in the case of Williams he would have awarded the widow £255, if it had not been for his award under the Law Reform Act. In the case of Davies, the judge awarded the sum of £700 for loss of expectation of life under the Law Reform Act, and, A in the case of Williams, the sum of £250. In each case, he has taken into consideration the whole amount awarded under the Law Reform Act when fixing the amount to be paid to the widows respectively under the Fatal Accidents Acts on the basis that the widow will in each case benefit to the full extent by the respective amounts awarded under the B Law Reform Act.

Counsel for the respondents contended that the amounts awarded under the Fatal Accidents Acts are in any event wholly insufficient in the case of the two infant children of Davies, and also in the cases of Mrs. Williams and her three dependent children. No appeal is made C in respect of the amounts awarded under the Law Reform Act, and, therefore, the sum of £700 awarded to Davies' estate and that of £250 awarded to Williams' estate must be taken as correct.

The Fatal Accidents Act, 1846, s. 1, provides as follows:

> Whensoever the death of a person shall be caused by wrongful act, neglect, or D default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sect. 2 of the same Act provides as follows:

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> Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting F the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

It appears to be plain from these provisions that the legal personal representative of the deceased person was given a new statutory right of action against the person liable, and that such right enures, not for the G benefit of the estate of the deceased person, but for the benefit of the dependants. Sect. 2 suggests that the damages should be assessed as one lump sum, and that the lump sum so assessed should be divided into appropriate parts by the jury, but I think that it is well settled that the right conferred by statute to recover damages is restricted to H the actual pecuniary loss sustained by each individual within the limits laid down (see *Pym* v. *Great Northern Ry. Co.* (6), at p. 407, and *Grand Trunk Ry. Co. of Canada* v. *Jennings* (7), at p. 803), and I see no objection to considering the case of each dependant separately, in the first instance, for by so doing the lump sum is ascertained and apportioned although the apportionment is made as a preliminary to the ascertainment of the lump sum. In substance, LEWIS, J., has said that, in the case of

Davies, assuming that the widow had obtained no benefit under the Law Reform Act, the amount he would have awarded would have been a lump sum of £955, and that he would have apportioned this between the widow and the two infant children in the following shares—namely, £705 to the widow, £100 to the girl, and £150 to the boy—but he has A reduced this amount to £255 because the widow is to benefit by reason of the award of £700 in favour of Davies' estate, on the footing that the whole of that sum passes to her on her husband's intestacy, and he has, therefore, reduced the lump sum from £955 to £255 by deducting from the widow's individual loss under the Fatal Accidents Acts the whole B of the £700.

There can be no question that, apart from any statutory provision to the contrary, the damages to be awarded under the Fatal Accidents Acts are to be ascertained with due regard to any benefits accruing to the persons entitled to participate in them by reason of the death which C gives rise to the right to such damages: see the summing-up to the jury by Lord Campbell in *Hicks* v. *Newport, Abergavenny & Hereford Ry. Co.* (8). It was on this ground that, before the passing of the Fatal Accidents (Damages) Act, 1908, the court directed juries, when assessing damages under the Fatal Accidents Act, 1846, to take into account D benefits derived by dependants from insurance policies effected by the deceased. After the passing of the 1908 Act, these benefits were expressly excluded from consideration in such assessment, for it provided as follows:

> In assessing damages in any action, whether commenced before or after the E passing of this Act, under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act.

It was argued by counsel for the respondents in this case that a further statutory exception has been introduced by sect. 1 (5) of the Law Reform F Act, which provides as follows:

> The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908. . . .

The question whether this subsection does in fact create a further G statutory exception to the matters to be taken into consideration in assessing damages under the Fatal Accidents Acts does not appear to have been argued in any reported case. In *Feay* v. *Barnwell* (9), Singleton, J., without argument on the point, reduced to £50 the amount of damages he would have awarded to a widow under the Fatal H Accidents Acts if she had taken no benefit by reason of her participation in damages to be awarded under the Law Reform Act by taking into account the sum of £575, the amount by which the judge held the widow benefited in a sum of £625 awarded to the deceased man's estate under the Law Reform Act. In so doing, Singleton, J., purported to follow the *dicta* of Lord Atkin and Lord Wright in *Rose* v. *Ford* (10). Lord

Atkin in his opinion in that case said, at p. 835 ([1937] 3 All E.R., at p. 363):

> I should add that I see no difficulty as to the alleged duplication of damages under the Act of 1934 [the Law Reform Act] and the Fatal Accidents Acts. If those who benefit under the last-mentioned Acts also benefit under the will or intestacy of the deceased personally their damages under those Acts will be affected. If they do not there seems no reason why an increase to the deceased's estate in which they take no share should effect the measure of damages to which they are entitled under [the Fatal Accidents Acts].

Then Lord Wright said, at p. 852 ([1937] 3 All E.R., at p. 375):

> It is said that if this element of damage is allowed [damage for loss of expectation of life] there may be a risk of duplication of damages in particular because the Act of 1934 by sect. 1 (5) provides that the rights conferred by the Act shall be in addition to and not in derogation of rights conferred on dependants by the Fatal Accidents Acts or other like Acts. If the Act necessarily involved this consequence it would all the same have to be enforced. But in my opinion [the Law Reform Act] does not. I think that in practice no duplication of damage need occur. I think the jury would be properly directed to take into account either that they were at the same time giving damages under Lord Campbell's Act as they did here or that such damages had been or might be given. The object of damages in these cases is compensation for the benefit of the estate. It is true that the claims under Lord Campbell's Act are independent and are for the separate pecuniary loss sustained by the dependants whereas the damages under the Act of 1934 go into the general estate in which quite different persons, creditors, legatees or other beneficiaries may be interested. But one of the fruits of continued life is generally provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced. The award of damages in the present case shows how duplication may be avoided.

It is difficult to understand the precise meaning of the last sentence I have read. As counsel for the respondents pointed out, the award of damages under the Fatal Accidents Acts was made by the judge at the trial without reference to any claim under the Law Reform Act, for such claim was wholly rejected by him. The award of £1,000 by the Court of Appeal by way of damages under the Law Reform Act was not arrived at after taking into account the £300 awarded by the judge under the Fatal Accidents Acts, nor was the £300 awarded under those Acts wiped out or reduced by reason of the widow's interest in the £1,000 awarded to the deceased's estate. It would appear plain that the duplication, which was said by Lord Wright to have been avoided by the award of damages in *Rose* v. *Ford* (10), was not in fact avoided. There is no reference in the report of arguments of counsel in *Rose* v. *Ford* (10) to any such point, nor is it referred to by the members of the House other than Lord Atkin and Lord Wright. In these circumstances, I think that this court is bound to treat the point as open for its consideration.

The only ground on which any interest taken by a dependant in the estate of the deceased can be ignored in assessing the damage suffered by him or her under the Fatal Accidents Acts is that such interest is excepted by statute from consideration, as, for example, the interest in the deceased's life insurance policies. The question to be answered is, therefore, whether or not there is any such statutory exception in the present case. Counsel for the respondents argued that such an exception was to be found in the express words of sect. 1 (5) of the Law Reform Act :

> The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908. . . .

The important words are : "The rights conferred by this Act." Whatever such rights may be, it is plain that the Act does not confer any rights in respect of damages for loss of expectation of life upon any person other than the legal personal representative of the deceased as representing the deceased person's estate and for the benefit of that estate. A person who is entitled to any beneficial interest in the estate of the deceased, whether by reason of the testamentary dispositions of the deceased or as the result of the application of the law with regard to intestate succession, does not get any right under the Law Reform Act. His or her interest in the estate must necessarily arise outside the Law Reform Act, and depends on the application of the law with regard to administration of estates as well as the law relating to testate or intestate succession. If a dependant takes a beneficial interest in the estate of a deceased person which has been increased by reason of the award of damages under the Law Reform Act, the taking into account of that beneficial interest in assessing the damage suffered by that dependant under the Fatal Accidents Acts cannot be said to affect injuriously the rights of that dependant under those Acts. His or her rights under the Fatal Accidents Acts remain unimpaired. The rights of the legal personal representative under the Law Reform Act cannot possibly be affected by anything awarded to dependants under the Fatal Accidents Acts, for the damages recoverable by the legal personal representative under the Law Reform Act are limited to the loss to the deceased's estate of the value of his own expectation of life, damages for pain and suffering and pecuniary loss, and cover nothing else except the funeral expenses. In the case of damages under the Fatal Accidents Acts, the taking into consideration of any interest derived by a dependant from the estate of the deceased does not involve setting off any right under the Law Reform Act against the rights of the dependant under the Fatal Accidents Acts, for, as already pointed out, the dependant as such has no right whatever conferred on him or her by the Law Reform Act. For these reasons, I think that the contention of counsel for the respondents must be rejected, and that this court must hold that, in assessing damages under the Fatal Accidents Acts, it is right to take into consideration any beneficial interest derived by a dependant from the estate of the deceased by reason of its increase by the award of damages to the legal personal representative of the deceased under the Law Reform Act.

du Parcq, L.J. : The main question in this appeal is whether, on the true construction of the Law Reform (Miscellaneous Provisions)

Act, 1934, s. 1 (5), the surviving spouse and children of a deceased person are entitled to have damages assessed in their favour under the Fatal Accidents Act, 1846, without regard being paid to any pecuniary gain which has resulted, or which is likely to result, to them by reason of the provisions of the first-mentioned Act.

If the contention of counsel for the respondents is correct, it would seem that this important subsection has either been overlooked or misunderstood both in the House of Lords and in this court, as well, I think, as by all the judges of the King's Bench Division. It may be added that, if the subsection is to be construed in accordance with the plaintiffs' submission, its provisions cannot be said to be based on any discoverable principle, and must lead to manifest injustice. However, counsel for the plaintiffs may be right when he says that we are not technically bound by any of the previous *dicta* or decisions of this court because hitherto the point seems never to have been taken. Therefore, I will state shortly my reasons for thinking that there is no substance in the plaintiffs' contention.

It must often happen that the rights conferred by the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of the estates of deceased persons bring pecuniary advantage to dependants who may also benefit under the Fatal Accidents Act, 1846. The 1934 Act provides by sect. 1 (5) that the rights so conferred are to be "in addition to and not in derogation of" any rights conferred on dependants by the Fatal Accidents Act, 1846. Therefore, it is necessary to consider exactly what are the rights of dependants under the Fatal Accidents Act. Under that Act, certain members of the family of a person whose death is caused by the wrongful act, neglect or default of another acquire a right to damages by way of compensation if "injury"—by which is meant pecuniary loss—has resulted to them from the death. Any dependants who have suffered no such loss acquire no rights at all under the Act. If they bring an action and prove no loss, actual or prospective, the defendant is entitled to the verdict: *Duckworth* v. *Johnson* (11). When the jury are considering whether or not there has been such loss, and, if so, what damages are "proportioned" to it, they must take into account any pecuniary gain which has resulted from the death, except in those cases in which Parliament has enacted that such gain is not to be taken into account. It is to be observed that, when Parliament has so enacted—namely, in the Fatal Accidents (Damages) Act, 1908, and the Widows', Orphans' and Old Age Contributory Pensions Act, 1925—it has used clear and unambiguous language which any draftsman wishing to express a like intention would probably think it wise to repeat. No similar words are used in the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (5), and I cannot construe the subsection as a direction that benefits which come to a dependant by reason of the Law Reform Act are to be left out of account, either for the purpose of ascertaining whether or not any right to damages exists or for the purpose of computing such damages. The only effect of the subsection, in my opinion, is to make it clear that, whatever pecuniary advantage may result to a dependant through the Law Reform Act, he remains entitled to damages under the Fatal Accidents Act if he is still in a position to prove a balance of pecuniary loss.

It is said that, if this is all the subsection means, it is superfluous. Such an argument is never very convincing, because caution, which sometimes seems to be superabundant, is a familiar, and perhaps a necessary, part of the equipment of the Parliamentary draftsman. In the present instance, it is possible, I think, to find a sufficient reason for the draftsman's caution. He may well have thought that, in the absence of express provision, it would be an arguable proposition that, when damages to which the deceased would have been entitled had he lived had been recovered by his estate, there could be no further right to damages for the defendant's negligence. Some support for that proposition might have been found in the language used by the judges of the Divisional Court in *Griffiths* v. *Dudley* (*Earl*) (12) where Field, J. said, at p. 363:

> *Read* v. *Great Eastern Ry. Co.* (13) is a clear decision that Lord Campbell's Act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived.

Later, Cave, J. expressed a similar opinion, at p. 365. These *dicta* of the Divisional Court seem to have resulted from a misunderstanding of *Read* v. *Great Eastern Ry. Co.* (13), as was pointed out by Lord Dunedin stating the opinion of the Privy Council in *British Columbia Electric Ry. Co., Ltd.* v. *Gentile* (14) at p. 1041, but the draftsman is not to be blamed for regarding them as a warning that, unless the words of the new Act put the matter beyond doubt, a judgment under it might be regarded as extinguishing all rights under the Fatal Accidents Act. However this may be, the meaning of the subsection, whether or not it was necessary, seems to me to be plain.

Counsel for the respondents supported his argument by indicating some of the difficulties which must confront the courts if his contention did not prevail. These difficulties, which I think seldom arise in practice, are not a novel product of this recent legislation. There were always some causes of action which did not die with the aggrieved person, and since 1846 there has existed the danger that a jury might be faced with the difficult duty of assessing the damages proportioned to a dependant's loss with due regard to the probable result of a pending or possible future action from which the dependants might benefit. If the juries of the nineteenth century were equal to the task, I know no reason why their modern successors, or judges performing the same functions, should be less successful. For these reasons, I have no doubt that, on the question of construction, the appeal fails.

Appeal and cross-appeal dismissed. Leave to appeal to the House of Lords.

Solicitors: *Russell Jones & Co.*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the appellants); *William A. Crump & Son*, agents for *A. J. Prosser*, Cardiff (for the respondents).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

ROOK *v.* FAIRRIE.

[Court of Appeal (Sir Wilfrid Greene, M.R., MacKinnon and du Parcq, L.JJ.), **January 30, February 3, 4, 5, 1941.**]

Libel and Slander—Damages—Assessment—Judge sitting without jury—Whether bound to award exemplary damages.

The plaintiff was awarded £550 damages in an action for libel. It was contended that the damages were inadequate, having regard to the position of the plaintiff, the baseness of the charges made against him and the lack of any foundation for those charges:—

Held: whereas a jury can express condemnation of a defendant only by awarding heavy damages, a judge is not so limited, and, in the circumstances of the present case, the sum awarded should not be interfered with.

[**EDITORIAL NOTE.** In assessing damages in certain cases a jury is entitled to give punitive damages. In such a case, by increasing the amount of the damages beyond the actual loss suffered by the plaintiff, the jury express their condemnation of the defendant. Where such a case is tried by a judge alone, the judge has an opportunity in delivering judgment of expressing his opinion of the defendant's conduct, and it is held that, if he does so and awards a smaller sum in damages, he has not proceeded upon any wrong principle which would make his award subject to review in the Court of Appeal. This matter does not seem to have been discussed in any previous case.

As to Punitive Damages, see HALSBURY, Hailsham, Edn., Vol. 10, pp. 87-90, para. 108; and for Cases, see DIGEST, Vol. 17, pp. 78-81, Nos. 1-17.]

Cases referred to:

(1) *Flinch* v. *Lovell*, [1935] 1 K.B. 354; Digest Supp.; 104 L.J.K.B. 199; 152 L.T. 231.

(2) *Bray* v. *Ford*, [1896] A.C. 44; 32 Digest 164, *1988*; 65 L.J.Q.B. 213; 73 L.T. 609; *revsg.* (1894), 11 T.L.R. 32.

Appeal by the defendant from a judgment of Atkinson, J., dated Sept. 19, 1940, and cross-appeal by the plaintiff on the question of damages. It was held by Atkinson, J., that the appellant had published certain libels on the plaintiff. He held further that the plea of privilege was met by proof of malice, and he awarded the plaintiff £550 damages. The defendant appealed on the facts and that appeal was dismissed. There was a cross-appeal by the plaintiff asking that the damages be increased, and it is only the cross-appeal which is reported here.

The appellant appeared in person.

A. T. Miller, K.C., and *H. C. Marks* for the respondents.

Sir Wilfrid Greene, M.R. : It is pointed out with great force by counsel for the respondent that these libels were of a very grievous character, in view of the circumstances in which they were published, the position of the plaintiff, and the particularly ignominious way in which the campaign against the plaintiff was conducted by the defendant, A and they say that to award a sum of only £550 in the case of libels of that character is to award a grossly insufficient sum. We are told that this is the first case in which this court has had to consider the position with regard to an award of damages in a libel action by a judge sitting alone. I do not understand it to be disputed by counsel for the respondent B that the principles laid down by Greer, L.J., in a well-known passage in *Flint* v. *Lovell* (1) are as applicable to a case of libel as they are to any other case in which this court is asked to vary the amount of damages awarded by a judge sitting alone. Greer, L.J., says, at p. 360 :

> I think it right to say that this court will be disinclined to reverse the finding of a C trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

D The present case, of course, is one where the complaint is not that the damages are too high, but that they are too low, but the observations of Greer, L.J., are general in their character, and apply to both cases. In my opinion, those principles are as applicable in a libel case as they are in any other case, but the manner of their application to that particular subject-matter is, perhaps, rather different from the manner of their E application to other cases. I will deal further with that aspect of the question when I come to the second branch of the argument.

The first branch of the argument was directed to the observations of Greer, L.J., as to the question whether a judge had acted upon some wrong principle of law. There are two arguments which fall to be considered under that head. F The first, perhaps, does not strictly come under that head, but it can conveniently be dealt with at this point. It is that, in arriving at the amount of damages which he awarded, the judge was under a misapprehension as to something which had been said at the trial by counsel for the plaintiff. In the transcript of the judgment, there G appears this passage :

> I was told that Mr. Rook was not wanting damages here, in the way in which many people do, to make money out of a libel action, but that he wanted a sum sufficiently large to indicate the view of the court.

We were referred to the passages in the address of counsel for the plaintiff, H of which that statement of the judge is a summary. It is pointed out that what he was saying was that he wanted the full damages to which he would be entitled, not because he wanted the money, but because he wanted that award of damages as something which would show that his character was established and so forth. I think that it is doing some injustice to the judge to treat the passage which I have quoted as implying that he was under any real misapprehension as to what counsel for the plaintiff meant. It seems to me that it is a fair statement in a concise form of the effect of what counsel was saying. At any rate, I can find nothing in it which would induce me to say that the mind of the judge was, for any substantial purpose, really deflected from the question which he had to consider by any such misapprehension as is suggested.

The other point, which is a point of law, is one of more general interest, but one which, in my opinion, is not difficult to answer. Following on the passage which I have read, the judge goes on to point out the difference which exists between the case of a libel action heard by a jury and a libel action heard by a judge alone. He points out truly that, in a case where there is only a jury, the only way in which the jury can indicate its view of the grossness of the libel, the conduct of the defendant and the character of the plaintiff is in the figure which the jury thinks right to award. In a case where a judge is sitting alone, on the other hand, ATKINSON, J., points out that those matters can be expressly dealt with in the judgment of the trial judge, and that, accordingly, the question of awarding a sum of damages which, by its mere magnitude, will show the views of the court is one which bears a very different aspect where the case is heard by a judge alone. He points out that a jury may take this attitude, and may say: " We are not allowed to say what we think about this case, and so we will give a very large sum, which will indicate what we think." It is said that that is a misdirection by the judge, that the consideration to which he is there pointing is one which he ought not to allow to affect his mind at all, and that his duty is to put himself in the position of a jury, without regard to the fact that, in his reasons for judgment, he is able to express in words what a jury can express only in figures. In my opinion, there is no misdirection here. Once one appreciates the nature of damages in a libel action and the rather complex objects which an award of damages in such an action are supposed to secure, the result, it appears to me, inevitably follows that, where a judge is sitting alone, the situation is in important respects different from that where he is sitting with a jury, because, although the same elements are always present, the method in which they ought in any individual case to be treated may well be different. Accordingly, I can find no misdirection there.

The other branch of the argument was directed to showing that the amount awarded, to quote GREER, L.J., was:

> . . . so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

It was said that in this case the figure of the award, on the face of it, and when considered in the light of all the circumstances of the case, was an entirely erroneous estimate. It is to be remembered that in a libel action the damages awarded are, for the most part, often entirely without any real connection with any pecuniary loss at all. In a case of personal injury, apart possibly from the element of pain and suffering, the injury complained of is one which can be linked with a pecuniary valuation, according to ordinary notions, to a greater or less extent, but, when one is dealing with damages in a libel case, one is endeavouring to express in terms of money several different things which are not really susceptible of a money valuation in any true sense. One is considering A the injury which the plaintiff has suffered, which may or may not be capable of pecuniary valuation. One is considering the conduct of the defendant, because one may award punitive or exemplary damages against him. One is considering the deterrent effect, and so forth. It results from that, it seems to me, that, in asking oneself the question whether B or not the estimate of a particular judge is entirely erroneous, one must remember that one is dealing with a type of damages upon which there may be a very wide divergence of opinion without either of the two extremes falling into what may be described as "an entirely erroneous estimate." One mind may take one view and another another, and it is C not the function of this court to decide between the two. One thing which this court must avoid doing is to substitute its own opinion as to what it would have awarded for the sum which has been awarded by the judge below. That is what I meant when I said that the manner of the application of the principles enunciated by GREER, L.J., to the case of a D libel action is rather different from that in other cases. I made that observation in view of what I consider is the right opinion, that, in deciding whether an estimate is entirely erroneous in a libel action, the very nature of the damages which are awarded makes the task of estimating such an error a great deal more difficult that it might be E in other types of action. The damages in a libel action are, of course, at large, and it is perhaps scarcely necessary to quote a well-known passage to which DU PARCQ, L.J., has called my attention in the opinion of LORD HERSCHELL in *Bray* v. *Ford* (2), at p. 52:

> But in the case of an action for libel, not only have the parties a right to trial F by jury, but the assessment of damages is peculiarly within the province of that tribunal. The damages cannot be measured by any standard known to the law; they must be determined by a consideration of all the circumstances of the case, viewed in the light of the law applicable to them. The latitude is very wide. It would often be impossible to say that the verdict was a wrong one, whether the damages were assessed at £500 or £1,000.

In the present case, it would, I venture to think, have been a hopeless G task to have endeavoured to induce this court to interfere with the figure of £550 if it had been awarded by a jury. However, it is said that in the case of a judge we have greater powers of interference. That is true, but, before we can exercise them, we must be satisfied that the estimate is entirely erroneous. It is said by counsel for the respondents— H and it is said truly—that this is a case for punitive damages. What the measure of such punishment should be is again a matter upon which different minds may take different views. The judge apparently took the view—and, in my opinion, he was entitled to do so—that, in considering the punishment to be imposed in the form of damages, the fact that this defendant had received in the judgment of one of His Majesty's judges a castigation as severe as that which this defendant has received was a matter which might properly be taken into account. The judgment of the judge makes it difficult to suppose that the defendant's word will be accepted in any matter where his personal interest is concerned, and in the sugar market—which we are told is the circle in which the libel would be calculated to do harm—if this defendant at any time hereafter is minded to attack the integrity of any person, I do not suppose that anyone will pay the slightest attention to what he says. It seems to me that the fact that a judge can do what a jury cannot do except in figures—namely, express his condemnation of a defendant who has published libels—is a matter which he may very well take into account in considering the *quantum* of damages which it is proper to award. I agree, as I have said, that this is a case where a jury might well have awarded a very much larger sum, and in fact it is not improper to say that, if I had been awarding damages here, I should have awarded a larger sum, but that circumstance does not entitle me to interfere with the judge's judgment, whose opinion upon the appropriate figure is entitled to as much weight as mine. It is a case of different minds taking different views, and, sitting in this court, I am not entitled to substitute my view for his. I think that that really disposes of the whole matter of the cross-appeal, and, in the result, it must be dismissed.

MacKinnon, L.J.: I agree. I wish to say only a few words. It is suggested that the damages were inadequate, in that they did not indicate the baseness of the charges made against the plaintiff in the libels and the actual lack of any foundation whatever for them. If the fixing of the amount of damages were the only way in which that proposition could be demonstrated, I agree that the figure ought to be far higher than that assessed by the judge, so entirely am I convinced that the imputations upon the plaintiff were utterly and completely without the slightest shadow of foundation. In my view, however, it is not so necessary. Until this war, all cases of this nature were tried with a jury, and it is only by fixing the amount of the damages that a jury can indicate their sense, if they feel it, of the iniquity of the defendant's defamatory statements and their conviction of the blamelessness of the plaintiff. As a result of that position of a jury, there have often been awarded damages which were obviously far in excess of actual pecuniary loss which could be supposed to have been suffered by the plaintiff. It is not immaterial in that respect to bear in mind that the higher the character of the man defamed—and in this case his character is of the very highest—the less he is damaged by the aspersions of a man of low character, and in this case we are concerned with the aspersions of one of the lowest of the low. A judge, however, is not limited to the fixing of damages. He can—and in this case the judge did—deliver a reasoned and lengthy judgment in the course of which he can express his sense of the iniquity of the defendant and the absolute blamelessness of the plaintiff and the untruth of the suggestions against him. If it were possible for me to express in language more forcible than that used by Atkinson, J., my conviction that the charges or insinuations against the plaintiff are absolutely without the slightest foundation, I would gladly do so. Equally would I do so if there were any language in which I could more forcibly express my opinion of the despicable character of the defendant and the wickedness of his malice. I do not, however, think that it was necessary for the judge, nor is it necessary for me, to supplement this deficiency of language by awarding a sum by way of damages out of all relation to any actual damage which the plaintiff can be supposed to have suffered. For these reasons, I agree that the cross-appeal fails, and must be dismissed without costs.

du Parcq, L.J.: I agree, and only wish to say that the views I have formed have been expressed in the judgment of Sir Wilfrid Greene, M.R., with which I desire to express my concurrence.

Appeal dismissed with costs. Cross-appeal dismissed.

Solicitors: *Lawrance, Messer & Co.* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re JOSLIN, JOSLIN *v.* MURCH AND ANOTHER.

[Chancery Division (Farwell, J.), **February 6, 1941.**]

Wills—Family provision—No provision made for wife—Provision made for children born out of wedlock and their mother—Moral obligation—Inheritance (Family Provision) Act, 1938 (c. 45).

The testator, who died in 1939, by his will left all his property to M., a woman with whom he had been living since 1934, and their two children, without making any provision for his wife. The marriage, of which there was no surviving child, took place in 1915, and the evidence showed that until 1934 the testator and his wife had been reasonably happy together, and that from time to time she had assisted him financially. About 1934, the testator contracted an alliance with M., by whom he had two children. Subsequently, he left his wife and, by a separation agreement made in 1937, he agreed to pay her £1 per week. The wife, who had some small means, applied under the Inheritance (Family Provision) Act, 1938, for reasonable provision for her maintenance. The value of the estate was about £370. M. had no means whatsoever:—

Held: in these circumstances, the wife was not entitled to have any provision made for her by the court. The testator had to choose between his moral obligations to M. and her children and his obligations to his wife, his estate being too small to provide for both, and the choice he had made was the right one, since his wife had some means, whereas M. was destitute.

[**EDITORIAL NOTE.** It might be supposed that the wife would have a prior claim to share in the testator's estate, but nothing is more certain than that, in cases under the Act of 1938, all the circumstances of each case must be taken into account and that the whole matter is in the discretion of the court. The result in the present case is that the court, after taking all the circumstances into account, has, in this case, found itself unable to interfere where the children of an irregular union and their mother have been preferred to the lawful wife.

As to Protection of Testator's Family, see HALSBURY, Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505.]

Application by a wife under the Inheritance (Family Provision) Act, 1938, for reasonable provision for maintenance out of her husband's estate. The applicant, Elizabeth May Joslin, was the widow of the testator, Fredrick John Joslin, whom she married in 1915. The testator's will was dated Feb. 11, 1938, and the testator died, domiciled in England, on Nov. 27, 1939. Probate of the will was granted to his executors, W. J. Murch and K. A. Wiles, on Jan. 15, 1940. The facts are fully set out in the judgment.

Harold Lightman for the plaintiff, the wife.

J. V. Nesbitt for the first two defendants, the executors.

Meyrick Beebee for the last three defendants, the beneficiary under the will and her two infant children.

Farwell, J.: The testator and his wife were married in 1915. A child was born in 1916, but died comparatively young. The testator and his wife lived together, except for a period during which the testator was serving in the war, 1914-1918, and, so far as the evidence suggests, they lived reasonably happily together. From about 1934, the testator lived with Hilda Manning, and by her he had two children, both of whom are alive and both of whom are still infants. On Mar. 12, 1937, the husband and wife entered into a separation agreement, under which the husband agreed to pay the wife £1 per week.

The husband died in 1939, and left a will by which he appointed executors and trustees. He left the whole of the income of the residuary trust fund to Hilda Manning for her life, and after her death to their two children. So far as is at present ascertained, the value of the estate is a little over £370. Some of the estate consists of small cottage property, and it may be that, if that estate is sold at a higher figure than that at which it was valued for probate, that figure may be increased. The wife herself, of course, has lost £1 per week to which she was entitled under the separation deed, but she has a comparatively small income which she derives partly from property and partly from taking boarders. It is quite true that her resulting income is very small, and no doubt she could well do with an addition to that income. With regard to the woman with whom the testator lived and by whom he had these two children, the position is that she is completely penniless, and she is in receipt of assistance under the poor law, she and her two children having nothing whatever to live on except what they get from the guardians.

In the circumstances, the testator was in a dilemma. No doubt he owed a duty to his wife, who had lived with him for many years, and who had had a child by him, and who had apparently assisted him with money from time to time, and it may be that he treated his wife badly when he left her and went to another woman. On the other hand, he was under a moral, if not a legal, obligation to make provision for his two children—who were none the less his children because they were born out of wedlock—and for the woman who had borne those two children. He was, as I have said, in a dilemma. I do not think that in cases of this sort it is right to take into consideration only legal obligations. In cases under this Act, the testator has to reckon with moral as well as legal obligations, and, in a case of this sort, the testator is not only entitled, but is bound, to consider how far he is under a duty —again a moral duty—to make provision for the children whom he has brought into this world and for the woman who has borne those children. On the other hand, he has to take into consideration the duty which he owes to the woman who was his wife at his death, and who has been through many vicissitudes with him, and who has, so far as the evidence goes to show, assisted him all she could for many years. That is a dilemma which the testator in such cases has to face. He has to make up his mind where his real duty lies, and whether he ought to allot what little money he has for the purpose of making some provision for the woman with whom he has lived and her children, omitting provision for the wife, who has some sort of provision of her own, or whether he ought to make provision for the wife, and leave out his own children and the woman who has borne those children.

I do not think that it is an easy dilemma for a man to have to face, and the fact that it is of his own making makes the dilemma no better. However, in such a case, in my judgment, if the estate is so small that it is not really practically possible to provide both for the wife and for the other woman and the children, and there is some provision already in existence for the wife, it is open to him to say: "Having regard to all the circumstances, I think that there is a duty upon me to make what little provision I can for the woman and the children, although it means that I must leave my lawful wife to continue to exist on what little she has—a small income which will enable her to live in a very small way. The other woman and the two children, having absolutely nothing, would otherwise be left penniless." In those circumstances, in my judgment, he is entitled to say: "My duty lies in this direction, and I am going to carry out what I believe to be my duty and to make provision for the children and the woman." That is what this testator elected to do.

It is said that the court ought to upset what the testator has done and to deprive the woman and the two children of some, if not all, of the very small provision made for them in order that some further provision other than what she has may be made for the lawful wife.

The jurisdiction under this Act is one which it is extremely difficult for the court to administer. The judge is put in a most unhappy position in cases of this kind. However, it is a discretion, and it is a discretion which the court must exercise judicially, and, in my judgment, this is not a case where the discretion of the court ought to be exercised in favour of the plaintiff. This is an application which the plaintiff has chosen to make, and which has been unsuccessful, and, in my judgment, it ought not, in all the circumstances, to have been made. Therefore, I dismiss the summons with costs.

Application dismissed with costs.

Solicitors: *Arnold Carter & Co.*, agents for *Dunn & Baker*, Exeter (for the plaintiff); *Torr & Co.*, agents for *Toller, Oerton & Balsdon*, Barnstaple (for the defendants).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

Applied. MAYO *v.* MAYO. [1948] 2 All E.R. 869.

Not followed. PERRING v. PERRING. [1949] 2 All E.R. 334.

FRAMPTON *v.* FRAMPTON AND BUSHELL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), **December 16, 20, 1940.**]

Divorce—Adultery—Confession—By wife—Expected child result of adultery —No proof of non-access.

A wife made statements to her husband and to the probation officer that the co-respondent, and not her husband, was the father of her expected child. There was no proof of non-access by the husband. It was contended that these statements were inadmissible in evidence as tending to bastardise the child:—

HELD: the statements were admissible to prove adultery.

[**EDITORIAL NOTE.** It was stated by SWIFT, J., in *Warren* v *Warren* (2) that a woman's statement that an expected child is the result of adultery is not evidence tending to bastardise the child unless the statement goes on to allege non-access by the husband. This view was approved by the Court of Appeal in *Ettenfield* v. *Ettenfield* (4), and in the present case the matter has been formally decided. Such an admission is evidence of adultery for the purpose of a divorce suit, but is not in law any proof as to the legitimacy or otherwise of the child.

AS TO CONFESSIONS OF ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 660-662, para. 973; and FOR CASES, see DIGEST, Vol. 27, pp. 300-303, Nos. 2766-2801.]

Cases referred to:

(1) *Russell* v. *Russell*, [1924] A.C. 687; Digest Supp.; 93 L.J.P. 97; 131 L.T. 482.

(2) *Warren* v. *Warren*, [1925] P. 107; Digest Supp.; 94 L.J.P. 68; 133 L.T. 352.

(3) *Roast* v. *Roast*, [1938] P. 8; [1937] 4 All E.R. 423; Digest Supp.; 107 L.J.P. 21; 157 L.T. 596.

(4) *Ettenfield* v. *Ettenfield*, [1939] P. 377; [1939] 2 All E.R. 743; Digest Supp.; 161 L.T. 230.

Husband's Petition for a decree *nisi* on the ground of his wife's alleged adultery. The petition was undefended. The facts are fully set out in the judgment.

S. L. Howes (for *J. R. B. Jones* on war service) for the petitioner.

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Hodson, J.: In this case, there is no evidence of adultery at all, except admissions made by the wife in the form of statements that the co-respondent, and not the husband, was the father of her expected child. These statements were made, not only to the husband, but also to the probation officer, who saw her. The question is whether the form B of those admissions rendered them inadmissible, in view of the decision of the House of Lords in *Russell* v. *Russell* (1). I was referred to the decision of Swift, J., in *Warren* v. *Warren* (2). The headnote in that case is as follows:

> A wife's admission that she had committed adultery, even if accompanied by a C statement of her belief that a child, subsequently born, was the result of the adultery, cannot bastardise the child without evidence of the non-access of the husband. The confession of the wife, therefore, that she has committed adultery is admissible as evidence in a suit for divorce so long as she does not assert that the husband could have had no access at the time of conception.

In that case, there were apparently other admissions of adultery by the D wife, besides statements by her to the effect that her pregnancy was due to intercourse with a man other than her husband. Of course, it can be argued that any admissions by a pregnant woman that she has committed adultery may tend to bastardise the child which she subsequently bears, but it appears to me that it does not make any difference in principle whether she simply says, "I have committed adultery," E or says, "I am pregnant by another man." That, I think, is what Swift, J., was, in effect, saying. He said, at p. 112:

> However many men she has had connection with nothing can bastardise the child unless non-access of or non-intercourse by the husband can be proved. Her evidence and proof of her conduct and statements are admissible unless and until F it is sought to prove by these means non-access or non-intercourse.

However, no question of non-access or non-intercourse arises in this case, and no attempt has been made to bastardise the child. The decision of Swift, J., was followed by the Divisional Court in *Roast* v. *Roast* (3), and more recently by the Court of Appeal in *Ettenfield* v. G *Ettenfield* (4), where Goddard, L.J., who delivered the judgment of the court, expressly said that the court desired to shed no doubt on the correctness of the decision in *Warren* v. *Warren* (2). I am quite satisfied that the statements made in this case, standing alone as they do, are quite sufficient for me to rest a finding of adultery upon them. I believe H that they are true admissions of adultery, and there will therefore be a decree *nisi*.

Decree nisi granted.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Kingsford, Flower & Pain*, Ashford, Kent (for the petitioner).

[*Reported by* D. Armstead Fairweather, Esq., *Barrister-at-Law.*]

BELL *v.* WALKER.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., and du Parcq, L.J.), **December 19, 1940.**]

Practice—Stay of action—Serving soldier—Usual order—R.S.C., Ord. 36, *r.* 10.

In an action for personal injuries against a serving soldier, the master indorsed the summons for directions: "Stay on usual terms as to serving soldiers":—

HELD: it is the duty of the master to examine the facts of each individual case, and, though there may be good grounds for delay where serving soldiers are concerned, there must be no usual order in such cases. A stay can be ordered only when a proper and full consideration of the facts warrants it.

[**EDITORIAL NOTE.** The fact that serving soldiers not only are continually being moved from one part of England to another, but also are frequently sent on foreign service, very often makes cases in which they are concerned proper ones for some delay. The opposing party has, however, a clear right to have his case heard within a reasonable time, for otherwise great hardship may be caused by the disappearance of witnesses. There can, therefore, never be a "usual order," but only one based on the circumstances of the particular case.

AS TO STAY OF PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 69-71, paras. 113-115; and FOR CASES, see DIGEST, Practice, pp. 975-985, Nos. 5091-5142. See also YEARLY PRACTICE OF THE SUPREME COURT, pp. 599-601.]

INTERLOCUTORY APPEAL by the defendant from an order of WROTTESLEY, J., dated Nov. 20, 1940. The plaintiff brought this action against a serving soldier to recover damages for personal injuries. The accident occurred at Malvern Link, near Worcester, and the plaintiff's witnesses lived in that neighbourhood. The defendant proposed to call as witnesses a soldier, two members of the Royal Army Service Corps, and a London consultant. The summons for directions asked that the trial should be taken at Birmingham. The master ordered trial in Middlesex, and indorsed the summons as follows: "Stay on usual terms as to serving soldiers." The usual terms as settled by the masters in King's Bench chambers were: "Action to be marked stayed. The Treasury Solicitor to inform the plaintiff's solicitor when he is ready to proceed to trial. Liberty to the plaintiff thereafter to restore the case to the active list." The plaintiff appealed to the judge in chambers, and WROTTESLEY, J., discharged the master's order, cancelled the stay placed on the action, and directed the action to be tried at the next assizes at Worcester. The defendant appealed from that order, and asked that the order of the master should be restored. The defendant being a serving soldier, his case was being conducted by the Treasury Solicitor, which is the usual practice in such cases.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K.C.,*) *and Valentine Holmes,* for the appellant.

J. F. F. Platts Mills for the respondent.

Attorney-General: Two questions arise for consideration. One question is as to the place of trial, and the other is as to the question of a stay.

On the question of stay, the relevant rule is R.S.C., Ord. 36, r. 10, the broad effect of which is that the convenience of everybody concerned is to be considered. In the present case, it is expected that there will be four Service witnesses. From the point of view of Service witnesses, London is more convenient than on circuit. With regard to a stay, A the form of the order asked for is not only fair and just as between the parties, but it is also one which has been approved by the masters, who have discussed the question as to what is the appropriate form of order in cases in which the Treasury Solicitor is able to satisfy the master that there has been difficulty in getting into touch with the defendant B or the witnesses, or where there is likely to be difficulty in securing the presence of Service witnesses. An order in the general form was asked for, and the order which has been made by Master Horridge is appropriate to this particular case. The Treasury does not want to delay the proceedings, but there is difficulty in getting into touch with certain C people. The order gives either party liberty to apply. Therefore, the liberty of the plaintiff to bring the matter before the master is safeguarded, if there should be any undue delay.

Platts Mills : It was not until the matter came before the judge that the plaintiff's legal advisers learned that there were Service witnesses. D There can be no more mistaken principle than that the master should make an order in this form merely because one or two of the witnesses are not immediately available.

The Attorney-General in reply : It is not the practice for this order to be made or applied for in all cases. Cases of this kind must be looked E at individually.

Sir Wilfrid Greene, M.R. : The reason for staying the action in cases where a serving soldier is concerned lies in the difficulty of tracing an individual soldier who may be required as a witness. In the present F circumstances, this may often be a difficult task, and may require considerable time. It is perfectly right and proper, in such circumstances, that the defendant, and the Treasury Solicitor who acts for him, should be given all reasonable opportunities of tracing such witnesses, so that their evidence may be available to the court. On the other hand, delay G may work considerable hardship to the plaintiff, for his witnesses may move from one part of the country to another. The civil population, as well as the military, are to-day in an extremely mobile state. Persons intended to be called as witnesses by the plaintiff may be killed by enemy action, and the right of the plaintiff to obtain a proper hearing may be H seriously prejudiced if any undue adjournment is granted to the defendant.

The function of the court in such cases is to weigh carefully all the facts of each individual case and to endeavour to do justice between the parties, not favouring the plaintiff or the defendant, but, at the same time, the plaintiff must have his case heard on such materials as are available at a reasonably early date. It is essential, therefore, that orders should not be made according to some usual terms applicable to the case of serving soldiers. If it is the practice of masters in King's Bench chambers to make such an order automatically, it must be changed forthwith. It is the duty of the master to examine the facts of each individual case, and, though I do think that in some cases a stay of this kind may be proper, whether or not it is so depends entirely on the facts of the particular case. Therefore, I shall be glad to see this "usual order" as such disappear and an order for a stay made only after a proper and full consideration of the facts, and only when the facts warrant it. The order of Wrottesley, J., in the present case will not in any way prevent the defendant from applying for a reasonable adjournment, and, if such application is supported by the necessary evidence, there will be no difficulty in securing the adjournment. We think that Wrottesley, J., took the right view, both as to the stay and as to the venue. For these reasons, the appeal must be dismissed.

du Parcq L.J.: I agree with every word of the judgment of Sir Wilfrid Greene, M.R.

Appeal dismissed.

Solicitors: *Treasury Solicitor* (for the defendant); *Caporn & Campbell*, agents for *Bowman & Evans*, Birmingham (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Distinguished. BAKER *v.* TURNER.
[1950] 1 All E.R. 834.

METROPOLITAN REAL AND GENERAL PROPERTY TRUST, LTD. *v.* SLATERS AND BODEGA, LTD.

REGAL PROPERTY TRUST, LTD. *v.* SLATERS AND BODEGA, LTD.

FREEHOLD AND LEASEHOLD INVESTMENT CO., LTD. *v.* SLATERS AND BODEGA, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **December 16, 17, 1940.**]

Emergency Legislation—Judgment for stated sum—Refusal of relief against execution—Leave to appeal—Right to stay of execution—Courts (Emergency Powers) Act, 1939 (*c.* 67), *s.* 1 (1).

Judgment was given against the defendant for the recovery of a sum of money and leave was given to the plaintiff to proceed to execution. The defendant thereupon obtained leave to appeal against the latter order, but no stay of execution was directed :—

HELD : in such a case, a stay of execution ought to be granted automatically, since, if the debtor is compelled to pay the sum recovered, the basis of the appeal is destroyed.

[**EDITORIAL NOTE.** The general rule is that the lodging of an appeal does not operate as a stay of execution. It may perhaps be said that, in modern times, the granting of such a stay has been made only upon the submission of the intending appellant to more and more severe terms. However, it is shown in the present case that, unless a stay is granted, the whole substratum of the appeal is destroyed, and it is therefore held that a stay should be granted in all such cases.

AS TO STAY OF EXECUTION, see HALSBURY, Hailsham Edn., Vol. 14, pp. 31-33, paras. 61, 62 ; and FOR CASES, see DIGEST, Vol. 21, pp. 442-454, Nos. 252-368.]

APPEAL by the defendants from orders of WROTTESLEY, J., dated Nov. 4, 1940. The claim in the action was for £200 for rent due in respect of premises occupied by the defendants, and used for their business of caterers and restaurant proprietors. That business had been adversely affected by the war, and the defendants found difficulty in paying all their debts out of the immediate profits of the business. They were, however, the owners of property worth about £1,000,000 and mortgaged for about £450,000. There was, therefore, ample security for any debts not immediately paid. In these circumstances, when judgment under R.S.C., Ord. 14 was signed against the defendants, they applied for relief under the Courts (Emergency Powers) Act, 1939. The master granted relief upon certain terms. The plaintiffs appealed, and WROTTESLEY, J., reversing the order of the master, gave the plaintiffs leave to proceed to execution. He also granted the defendants leave to appeal, but gave no order as to a stay of execution. Before this appeal was heard. the defendants paid all sums due under the judgment.

Patrick Devlin for the appellants.
Robert Fortune for the first and third respondents.
A. S. Diamond for the second respondents.

SIR WILFRID GREENE, M.R.: The fact that payment has been made destroys the whole basis of this appeal, and the result is that the appeal must be dismissed with the usual consequences. Generally, I would say with regard to applications under the Courts (Emergency Powers) Act, 1939, that, in the case of a judgment for money—I say nothing about other cases—where leave to appeal is given to the debtor, it should follow as a matter of course, and it should be expressly stated in the order, that there should be a stay of execution pending the appeal. If that course is not taken, the debtor is under a compulsion to pay. As soon as he pays, the judgment is satisfied, and the substratum of the case is irretrievably destroyed. Therefore, it follows that, where leave to appeal is given to a debtor, the debtor should have a stay of execution in order that his appeal may be determined.

CLAUSON, L.J.: I agree. I should like to associate myself with what SIR WILFRID GREENE, M.R., has said.

GODDARD, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Clifford-Turner & Co.* (for the appellants); *Lewis & Sons* (for the first respondents); *Hicks, Arnold & Bender* (for the second respondents); *Badham, Comins & Sloman* (for the third respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

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oroved. BARKWAY *v.* SOUTH LES TRANSPORT CO., LTD. [1948] .ll E.R. 460.

Distinguished. In the Estate of HILL (*decd.*). [1948] 2 All E.R. 489.

PLOMIEN FUEL ECONOMISER CO., LTD. *v.* NATIONAL MARKETING CO.

[CHANCERY DIVISION (Morton, J.), **February 5, 1941.**]

Evidence—Admissibility—Written statement by deceased person made while proceedings pending—Statement by plaintiffs' employee—Party interested—Evidence Act, 1938 (*c.* 28), *s.* 1.

In an action for breach of express or implied terms of a contract and for passing off, the plaintiffs desired to put in evidence a proof of evidence taken from a man who had been employed by them in their fuel economiser business as a tester, and who was dead at the time of the action.

It was contended that the proof was inadmissible, as the tester was "interested in" the proceedings within the meaning of the Evidence Act, 1938, s. 1 (3) :—

Held : the tester was a person "interested" within the meaning of the subsection, in that he was a person interested in the result of the proceedings. The proof was, therefore, not admissible.

Semble : in the case of a limited company, every director and every shareholder is a person "interested" within the meaning of the subsection, but there may be circumstances in which a servant of the company is not a person "interested."

[**EDITORIAL NOTE.** The admission of evidence which cannot be subjected to cross-examination is necessarily strictly limited, and one of the most obvious safeguards is to exclude statements made by interested parties at a time when they knew, or ought to have known, that the matter would be litigated. The question here is the definition of "interested" person and this expression is held to include an employee who has reason to suppose that the success or failure of the litigation will affect his position as a servant of one of the parties to the action.

As to Documentary Evidence, see HALSBURY, Hailsham Edn., Vol. 13, p. 640, para. 708 *et seq* ; and for Cases, see DIGEST, Vol. 22, pp. 191, 192, Nos. 1615-1625. See also YEARLY PRACTICE OF THE SUPREME COURT, p. 636.]

Interlocutory Proceeding as to the admissibility of certain evidence under the Evidence Act, 1938, s. 1. In an action for breach of contract and passing off, a question arose as to whether a proof of evidence could be admitted in evidence. The facts are fully set out in the judgment.

K. E. Shelley, K.C., and *G. T. Aldous* for the plaintiffs.

G. H. Lloyd-Jacob for the defendants.

Morton, J. : The plaintiffs in the action tender in evidence a proof of evidence taken from one Hector Petrie and signed by him. At the time when the proof was taken, Petrie was a tester in their employ. Their business was, and is, to supply a device known as the Plomien fuel economiser. The object of the device is to reduce the amount of fuel used in a boiler to which the device is fitted, and Petrie's work was to carry out a test to ascertain the result achieved by the fuel economiser in the case of any particular boiler. The material statement in the proof on which the plaintiffs seek to rely relates to a document said to have been issued by the defendants in this action. The defendants carried on business under the title of the National Marketing Co., and the document which they are said to have issued is headed :

> Here are a few of the many well-known firms to whom the National Marketing Co. has supplied fuel economisers.

The proof which it is desired to put in evidence contains, amongst other things, a statement to the effect that the fuel economiser supplied to some of the persons named in that document was the plaintiffs' Plomien fuel economiser, and not the fuel economiser marketed by the defendants, which is known as the Fedino. There is no doubt that this proof was taken at a time when this action was pending, and I understand that it is not disputed that Petrie has died since it was taken, though I am not sure whether that fact has been formally proved in evidence. At any rate, the point was argued on the footing that Petrie is now dead.

The Evidence Act, 1938, s. 1, provides as follows:

> (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say (i) if the maker of the statement either (*a*) had personal knowledge of the matters dealt with by the statement [that is the fact in the present case] . . . and (ii) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead . . . (3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish. (4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

In the present case, the proof in question was signed by Petrie. Then subsect. (5) provides as follows:

> For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances. . . .

In view of the terms of subsect. (5), I have looked at the document in question, but, if I decide that it is not admissible in evidence, I shall, of course, dismiss its contents from my mind as allegations which have not been proved by evidence.

Counsel for the plaintiffs submits that Petrie was not "a person interested" within the meaning of subsect. (3). At one time he contended also that the present action did not involve a dispute as to any fact which the statement might tend to establish, but he abandoned this point, and said that he was content to rely solely upon the first point which I have mentioned. I think that that abandonment was founded on good reasons, because the allegation to which I have referred and which he seeks to establish by this document was in fact opened by him as one of the facts on which he relied as proving passing off or breach of contract by the defendants in this case, and in fact the document to which I have referred, and which is said to have been put out by the defendants, is now by amendment expressly pleaded in the statement of claim.

In my view, "a person interested" within the meaning of this section must, in the context, mean a person interested in the result of the proceedings "pending or anticipated." It seems to me that a useful test, though perhaps not the only test, is whether it was better for Petrie that the plaintiff company should succeed in the present action or whether it was a matter of indifference to him. Applying that test, was Petrie a person interested? The nature of the action may be briefly stated as follows. The plaintiffs, being, as I have said, persons who market a device known as the Plomien fuel economiser, allege that the defendants have been guilty of breaches of express or implied terms in an agreement arrived at between the plaintiffs and the defendants in Jan., 1940. They also allege that the defendants have been guilty of passing off their Fedino fuel economiser as and for goods of the plaintiff company. As I have said, under the particulars given in the statement of claim, they allege that the defendants have prepared and have issued the list of users to which I have referred.

I do not know whether Petrie was paid a salary quite irrespective of the number of tests which in fact he carried out for the plaintiff company, or whether his remuneration depended in any degree at all upon the nunber of tests which in fact he carried out, but it seems to me that it must be to the advantage of the plaintiffs' tester if the plaintiff company wins this action instead of losing it. The object of the action is to prevent the plaintiffs' trade being damaged by what they say are unfair acts on the part of the defendants, and it seems to me that one whose employment consists of testing the Plomien fuel economiser must be benefited the more the plaintiff company prospers and the more the fuel economisers are sold by that company and are tested by him. To take an extreme instance, it is clearly better for Petrie if the plaintiff company sells 10,000 Plomien economisers than if it sells one. The amount of his work is increased, and I suppose that it is reasonable to infer that his importance to the company is increased, and possibly in time, if not immediately, his remuneration might be increased. I think, therefore, that in this particular case Petrie must be held to be a " person interested " within the meaning of the subsection.

In the case of a limited company, it would seem clear that every shareholder is a person interested in the success of proceedings brought by the company, and, I should think, every director. Whether every servant of the company in every set of circumstances is necessarily " a person interested " is not a matter on which I have formed any concluded judgment. It may be that there are circumstances in which it might be said that a servant of the company was not a person interested. As to that, I express no opinion. However, I think that the general intention of the section is that, if a statement is put in as evidence, to which, of course, no cross-examination can be directed, it should be either a statement made at a time when proceedings are not pending or anticipated involving a dispute as to any fact which the statement might tend to establish or a statement made by what I may perhaps conveniently describe as an independent person. For these reasons, I arrive at the conclusion that the document tendered as evidence is not admissible within the statute. I need hardly say that, in arriving at that conclusion, I have done so as a pure question of law without throwing the faintest imputation upon the honesty of Petrie or the accuracy of his statement.

Solicitors: *Simon, Haynes, Barlas & Ireland* (for the plaintiffs); *Rowley, Ashworth & Co.* (for the defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

Re WARD, PUBLIC TRUSTEE *v.* WARD,

[CHANCERY DIVISION (Farwell, J.), **February 14, 1941.**]

Charities—Religious purposes—Absolute discretion of trustee—"Educational or charitable or religious purposes for Roman Catholics in the British Empire."

A testator by his will gave the residue of his property "to the Archbishop of Westminster or other head of the Roman Catholic Church in England for the time being upon trust that he shall forthwith in his absolute discretion devote the same to the furtherance of educational or charitable or religious purposes for Roman Catholics in the British Empire in such manner in all respects as he may think fit." It was contended that this was not a good charitable gift and was void for uncertainty :—

HELD : there was no general overriding charitable intention in the will, and the construction must be confined to the actual words of the bequest. The word "or" was *prima facie* disjunctive, and the words "religious purposes for Roman Catholics in the British Empire" might embrace objects which were not charitable in the legal sense. The gift therefore failed, and there was an intestacy as to the residue.

(ii) the mere fact that purposes, which may or may not be charitable in law, are disjunctively associated with charitable purposes does not make it essential to construe those purposes as necessarily not charitable in the legal sense.

[**EDITORIAL NOTE.** The question in this case, though at first sight a complex one. is merely whether a gift for religious purposes is a good charitable gift. There could not upon any reading of the will be a general charitable intent, for, although the whole residuary estate was given to what are popularly called charitable purposes, it was impossible after the decision in *Re Diplock, Wintle* v. *Diplock* (2) even to suggest that there was any such general intent here. The question was thus reduced to whether educational purposes and religious purposes, taken separately, were in law charitable. It is held that there was no doubt that educational purposes were within the legal definition of charitable, but the words "religious purposes," coupled with the very wide discretion given to the trustee, are held to extend beyond those strictly charitable. It would seem that here, as in *Re Diplock, Wintle* v. *Diplock* (2), the manifest intention of the testator has been defeated by a pure technicality.

AS TO RELIGIOUS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122, paras. 155-160 ; and FOR CASES, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160.]

Cases referred to :

(1) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531 ; 8 Digest 241, *1* 61 L.J.Q.B. 265; 65 L.T. 621 ; 3 Tax Cas. 53.

(2) *Re Diplock, Wintle* v. *Diplock*, [1941] 1 All E.R. 193 ; Digest Supp. ; *revsg.*, [1940] 3 All E.R. 538.

(3) *Farley* v. *Westminster Bank, Ltd., Re Ashton's Estate, Westminster Bank, Ltd.* v. *Farley*, [1939] A.C. 430 ; [1939] 3 All E.R. 491 ; Digest Supp. ; 108 L.J.Ch. 307 ; 161 L.T. 103.

ADJOURNED SUMMONS to determine whether the residuary gift under the will of Charles Holwell Ward was a good charitable bequest. The testator made his will on Nov. 17, 1939. He died on May 27, 1940, and probate was granted to the Public Trustee in the Exeter District Registry on July 12, 1940. The net value of the estate was £86,468. The material provisions of the will are fully set out in the judgment.

A. P. Vanneck for the plaintiff.

Geoffrey Cross for the first defendant.

J. Pennycuick for the second and third defendants.

G. C. Dare (*for R. Edwards* on war service) for the fourth and fifth defendants.

H. Wynn Parry, K.C., and *H. E. Salt* for the sixth defendant, the Archbishop of Westminster.

Hubert Rose for the seventh defendant.

H. O. Danckwerts for the eighth defendant, the Attorney-General.

FARWELL, J.: The question which I have to decide is one of considerable difficulty. The question is whether the testator has validly disposed of his residuary estate by a good charitable gift or whether the attempted disposition of that residuary estate by him is void for uncertainty. The terms of the gift are these:

> As to all the residue and remainder of my estate and effects both real and personal of whatever nature and kind soever I give devise and bequeath the same to my trustee upon trust that my trustee shall call in and convert into money . . . in trust to pay my funeral and testamentary expenses and debts and the legacies hereinbefore bequeathed or by any codicil hereto and shall stand possessed of the residue of the said moneys in trust to pay and transfer the same to the Archbishop of Westminster or other the head of the Roman Catholic Church in England for the time being upon trust that he shall forthwith in his absolute discretion devote the same to the furtherance of educational or charitable or religious purposes for Roman Catholics in the British Empire in such manner in all respects as he may think fit.

As I understand the law in this matter, it is that, if a trust of this sort is not strictly charitable within the legal meaning of the word "charitable," it is a trust which no one is interested to enforce. If a trust is a strictly charitable trust—that is to say, charitable within the legal meaning of the word—then the Attorney-General can at any time interpose for the purpose of preventing the misuse of the trust fund, but the court will not give effect to a gift which is so uncertain that no one can enforce it. If, therefore, this gift is purely for charitable purposes, there can be no vice in it. If, on the other hand, it gives to the trustee—namely, "the Archbishop of Westminster or other the head of the Roman Catholic Church in England"—power to apply the amount in any of the ways specified, if all or any of them are not charitable within the meaning of the word as used in the legal sense, then the gift is void for uncertainty, because it leaves the Archbishop completely free to apply this fund in any way he pleases within the terms of the will.

The exact meaning of the word "charitable" in the legal sense is to be found in the well-known definition of LORD MACNAGHTEN in *Income Tax Special Purposes Comrs.* v. *Pemsel* (1), at p. 583:

> How far then, it may be asked, does the popular meaning of the word "charity" correspond with its legal meaning? "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

If, therefore, the gift is to be properly treated as a charitable gift, it must come within the definition which LORD MACNAGHTEN gave in that case. The difficulty here is, as it seems to me, that the testator has used the word "charitable," which, standing alone, would be sufficient to make it a good charitable gift ("for charitable purposes" is amply sufficient), but he has coupled with the word "charitable" the two words "educational" and "religious," and he has inserted the word "or" in both cases. between "educational" and "charitable" and "religious" and "charitable" I think that it is quite plain on the authorities that—*prima facie*, at any rate—the word "or" is not in itself a conjunctive word. It cannot be read, ordinarily speaking, for "and," and, therefore, I have to consider the effect of a gift for "educational or charitable or religious purposes."

Before I go on to consider the particular language here, there is one word which I desire to say, and that is this. There is nothing in this will, so far as I can see, to denote any general charitable purpose. There is nothing in the preceding part of the will, or the succeeding part of the will, to indicate any such purpose at all. The only purpose of the testator as to the destination of his residuary estate is to be found in this one clause, and it purports to show, as I think is clear, that he had in mind to put into the hands of the person holding the position of Archbishop of Westminster a fund which was left to his discretion to apply as he thought fit for the purposes of Roman Catholics in the British Empire, whether he thought those purposes could be best served by using the money for educational, charitable or religious purposes. There is nothing here to suggest any general charitable purpose.

I say that because reference has been made to *Re Diplock, Wintle* v. *Diplock* (2), a recent decision of my own which was overruled in the Court of Appeal. That case, as it seems to me, was one where it was possible to find in the general language and scope of the will a general overriding charitable purpose, and, once having found that in the will, it seemed to me to be possible to give effect to the testator's general intention, notwithstanding that the words which he had used by themselves would be wide enough, and were wide enough, to embrace purposes other than purely charitable purposes. That view did not find favour in the Court of Appeal, who, as I understand it, said in the first place that they could find no sufficient general charitable purpose such as I was able to find. That being so, the whole reason for my decision went. Failing a general charitable intention—an overriding charitable intention—there could be no reason or justification for treating the words (which in that case were "charitable or benevolent") as other than a gift for purposes partly charitable and partly not charitable. Further, the Court of Appeal took the view that the word "or" must be used disjunctively, and, therefore, a distinction was drawn between that which was charitable and that which was not charitable. However, I think that the substantial difference between the view which I took and that taken by the Court of Appeal was this. I thought that there was a sufficient general charitable intention disclosed in the will as a whole to justify the reading of the words in question as being confined to that which was strictly charitable. That view the Court of Appeal was not able to adopt, and it necessarily followed that the words—which by themselves I should not have doubted for a moment on the authorities were insufficient to confine the gift to charity—had to be given their ordinary meaning, and, accordingly, the gift failed. I say that because I am anxious that it should be understood that I did not intend to suggest, and I am not suggesting, and I cannot suggest, that the word "or" in this sort of use can *prima facie* ever be read simply conjunctively. It is disjunctive. There is no doubt about it, and it was only because I thought that I could find sufficient in the will itself to make plain the intention of the testator to devote his residue to charity that I was able to come to the conclusion which I did, a conclusion which has proved to be wrong.

I do not think that this really touches the question with which I am now dealing. There is no general charitable intention here, as I have pointed out. The testator desired to put his residue at the disposal of the Archbishop of Westminster for the purpose of promoting the welfare of Roman Catholics in the British Empire, but the method to be adopted by the Archbishop is left to his discretion so long as the purposes are confined to educational or charitable or religious purposes. That being so, I have to consider whether these words can be read in such a way as to confine the purposes to which the money can be applied to those which are strictly charitable, or whether they must be treated as words which indicate objects which, although well deserving and everything else, are not strictly charitable within the legal meaning of that term, and, in reading the words, I must read them disjunctively. I have first of all the purpose of the furtherance of educational purposes. That, I think, is properly a charitable purpose. As LORD MACNAGHTEN said in *Pemsel's* case (1), one of the matters which comes within the meaning of the word "charity" is the advancement of education. I think that it is clearly possible to read a gift for educational purposes as being a trust for the advancement of education. Therefore, I think that those who desire that this gift should be held to be invalid cannot put much reliance on the word "educational." It was suggested that there may be educational institutions which do not really benefit the public at all, and may be said not to be a charity within such a gift as this, but I confess that I think myself that a gift for educational purposes is—*prima facie*, at any rate—a charitable gift, and it is none the less charitable, I think, because the word "educational" is used with the word "charitable," the word "or" being between those two words. I think it is not necessarily an uncharitable purpose, to use that word in the legal sense, because it is in a sense contrasted with a charity. Therefore, I do not think, as I have said, that great reliance can be placed on the use of the word "educational." However, when one comes to the words "religious purposes," the position becomes very much more difficult for those who are seeking to uphold this gift. I think that there is no doubt, as Lord Macnaghten has said, that a trust for the advancement of religion is also within the legal meaning of "charity," but a fund to be devoted to "religious purposes for Roman Catholics in the British Empire" seems to me not to be such a trust as can be said to be confined to the advancement of religion. The money might be used for many purposes in connection with the Roman Catholic religion which might be extremely estimable and admirable in every way and yet might not be charitable within the legal meaning of that word. The authorities show that religious purposes are not necessarily charitable. For instance, in *Farley* v. *Westminster Bank, Ltd.* (3), which went to the House of Lords, the gift was to the vicar and churchwardens of a parish for parochial purposes. The House of Lords, confirming the Court of Appeal, held that that was not a charitable gift, because, although the parochial purposes to which the money might be applied might only be charitable purposes, it was not necessarily confined to them. It might be used for various good works which were not strictly charitable. Thus, in my judgment, the words "religious purposes" in themselves are wide enough to embrace purposes which are not charitable within the legal meaning of the word.

Then I have to consider the effect of the words "religious purposes" contrasted, as it were, with that of the word "charitable." I have been invited to say that the word "charitable" in this case ought to be read not as meaning charitable in the legal sense, but as confined to charity for the relief of poverty, and it was said that, if I read these words as being "for the purpose of education or for the relief of poverty or for the advancement of religion," then, read in that way, all the purposes are charitable and the gift is a good charitable gift as a whole. However, I feel a great difficulty in so confining the word "charitable." It seems to me that it is not open to me to say that a gift for a "charitable or religious purpose" is one which is necessarily confined to legal charity. If the Archbishop, with the best intention and will in the world, came to the conclusion that this money or some part of this money, could best be applied in promoting some particular religious community or some particular activities of the Roman Church which were not strictly charitable, I cannot see anything in this gift which would prevent him from so applying the money, and, when I am faced with the words "educational or charitable or religious purposes," it does seem to me that I am driven to the conclusion that the testator has deliberately intended to give the widest possible discretion to the trustee so that he can devote the money which will come to him to one or any of the three purposes which he has defined, whether educational or charitable or religious. Taking the three words as contrasted one with the other, and taking the care, which I think I am bound to take, to read them in the proper sense, the only conclusion to which I can come is that the testator did deliberately intend to embrace within the purposes for which the money might be used purposes which might not come within the strict legal definition of the word "charitable." Having once come to that conclusion, I think that the only possible result is that I must declare that the gift of the residuary estate is invalid for uncertainty and fails, and that there is an intestacy as to the residuary estate.

Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the residuary estate. A

Solicitors: *Walter Crimp & Co.*, agents for *Harold Michelmore & Co.*, Newton Abbot (for the plaintiffs, the first five defendants; and the seventh defendant); *Witham & Co.* (for the sixth defendant); *Treasury Solicitor* (for the eighth defendant). B

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

Re WEBB, BARCLAYS BANK, LTD. *v.* WEBB AND OTHERS.

[CHANCERY DIVISION (Farwell, J.), **February 18, 1941.**]

Insurance—Policy taken out by father on life of son—Powers exercisable on behalf of son—Father's interest to cease on son attaining 21 *years—Policy held in trust for son.*

The testator took out a policy of insurance on the life of each of his two infant children payable to their personal representatives on the death of either of them after their attaining the age of 21 years. If a child died before attaining 21 years, the testator had the right to recover part of the premiums paid. The policies, and all the powers exercisable thereunder, were stated throughout to be "for the benefit" of the children, and, on their attaining the age of 21 years, the testator's own interest in the policy moneys terminated :—

HELD : the terms of the policies created a trust in favour of the children, and the policies were held not for the benefit of the testator's estate, but in trust for the children.

[**EDITORIAL NOTE.** In the line of cases here referred to, the terms of a number of policies have been considered, but in each case it has been held that the policies formed part of the estate of the person taking out the policy, and were not held in trust for the person for whose benefit the policy was apparently taken out. As is pointed out in the judgment, it would appear that the draftsman of the policy here considered has had the previous decisions clearly in mind, and, basing his phrasing on the judgments therein, has succeeded in establishing a trust for the infant beneficiary.

AS TO PERSONS ENTITLED TO POLICY, see HALSBURY, Hailsham Edn., Vol. 18, p. 531, para. 842 ; and FOR CASES, see DIGEST, Vol. 29, p. 422, Nos. 3288, 3289.]

Cases referred to :

(1) *Cleaver* v. *Mutual Reserve Fund Life Assocn.*, [1892] 1 Q.B. 147 ; 29 Digest 369, *2969* ; 61 L.J.Q.B. 128 ; 66 L.T. 220.

(2) *Re Engelbach's Estate, Tibbetts* v. *Engelbach*, [1924] 2 Ch. 348 ; 29 Digest 422, *3288* ; 93 L.J.Ch. 616 ; 130 L.T. 401.

(3) *Re Burgess's Policy* (1915), 85 L.J.Ch. 273 ; 27 Digest 151, *1220* ; *sub nom. Re Burges's Policy, Lee* v. *Scottish Union & National Insurance Co.*, 113 L.T. 443.

(4) *Re Policy No. 6402 of the Scottish Equitable Life Assurance Society*, [1902] 1 Ch. 282 ; 29 Digest 375, *3007* ; 71 L.J.Ch. 189 ; 85 L.T. 720.

(5) *Dyer* v. *Dyer* (1788), 2 Cox, Eq. Cas. 92 ; 25 Digest 511, *78*.

(6) *Re Sinclair's Life Policy*, [1938] Ch. 799 ; [1938] 3 All E.R. 124 ; Digest Supp. ; 107 L.J.Ch. 405 ; 159 L.T. 189.

ADJOURNED SUMMONS to determine whether two insurance policies taken out by the testator belonged to his estate or were held in trust for his children. The testator, Henry Bertram Law Webb, took out two insurance policies on the lives of his son and daughter, Thomas Roderick Webb and Theresa Helen Webb, with the Friends' Provident and Century Life Office, dated May 4, 1934, and Aug. 17, 1936, respectively. The facts are fully set out in the judgment.

E. M. Winterbotham (for *H. Hart* on war service) for the plaintiff bank, the executors.

Leonard Stone for the infant children.

Lindsay M. Jopling for the widow and residuary legatees.

FARWELL, J.: This summons raises a question upon the true construction and effect of certain policies of assurance. The parent who effected these policies died on Aug. 19, 1939, having made a will dated Feb. 8, 1938. By that will, he appointed Barclays Bank, Ltd., to be his executors and trustees, and he devised the whole of his residuary estate to them upon the usual trusts for sale and conversion, and directed the bank to pay out of the proceeds of sale his funeral and testamentary expenses, debts, etc., and then upon trust to pay the income to his wife during her life, and from and after her death:

> . . . upon trust to pay the income thereof to all and every my children or my child (if only one) living at my death who being sons or a son attain the age of twenty-one or being daughters or a daughter attain that age or marry and if more than one in equal shares.

Then there is a certain provision with regard to the children's shares, and, in the event of no child of the testator becoming entitled or the trusts failing in respect of the children, then there is a trust in favour, as to capital and income, of the child or children of a brother of the testator. Finally, the ultimate trust, if all the other trusts fail, is in favour of the pension fund of the Incorporated Society of Authors, Playwrights and Composers.

There is nothing in the will itself which causes any difficulty, and no question of construction of the will itself arises, but the question which I have to determine arises in this way. The testator left him surviving his widow (who is one of the defendants to this summons) and two children, one of them being Thomas Roderick Webb, born on Dec. 5, 1933, and the other Theresa Helen Webb, born on Dec. 24, 1935. During his lifetime, the testator took out two policies on the lives of his two children, and copies of those policies are produced. All the premiums on the policies were paid by the testator down to the time of his death, and the question which now arises is whether the moneys secured by the policies are the property of the infants respectively—that is to say, whether the infant named in each policy is entitled to the money assured—or whether the money which is payable, or will be payable, under these policies is the property of the estate of the testator, and, therefore, forms part of his estate.

Questions of this sort have been before the court more than once recently, and in all the cases concerning a policy of this sort by a father or another person on behalf of an infant it has been established that, ordinarily speaking, the mere fact that a man takes out a policy for or on behalf of an infant does not constitute that person a trustee for the infant, and that, apart from some special provisions in the policy pointing to the conclusion that the insurance money was to be a fund to which the infant was to be entitled, and accordingly the assured and the assured's estate would take any money merely as trustee for the infant, the infant for whom the policy was taken out would have no title to the money. I think that the foundation of those decisions was really a case in the Court of Appeal, *Cleaver* v. *Mutual Reserve Fund Life Assocn.*

(1). That was a case arising out of the somewhat notorious death of James Maybrick, with the resulting charge of murder against his wife. The headnote in that case is as follows:

> The executors of a person who has effected an insurance on his life for the benefit of his wife can maintain an action on the policy notwithstanding the fact that the death of the insured was caused by the felonious act of the wife. The trust created by the policy in favour of the wife under the Married Women's Property Act, 1882, s. 11, having become incapable of being performed by reason of her crime, the insurance money forms part of the estate of the insured and as between his legal representatives and the insurers no question of public policy arises to afford a defence to the action.

I do not think it necessary for me to refer in any detail to this case, but the result of it was that the representative of the husband became entitled to recover the money. Subsequently a case came before ROMER, J., in which he cited the judgment of FRY, L.J., in *Cleaver's* case (1). That was *Re Engelbach's Estate, Tibbetts* v. *Engelbach* (2), a case not unlike the present one. The headnote is as follows:

> An endowment policy taken out by a person in his own name for the benefit of his daughter, to mature on her attaining a specified age, creates no legal estate in the daughter and she cannot sue on the contract, nor does the assured thereby constitute himself a trustee for his daughter of the policy and of the moneys payable thereunder. If, therefore, the assured dies before the policy matures the policy moneys belong not to the daughter but to the estate of the assured and must be paid to his executors.

In that case, ROMER, J., begins his judgment as follows, at p. 351:

> A very similar question to the present one arose in *Cleaver* v. *Mutual Reserve Fund Life Assocn.* (1). Before considering that case, however, I may say this: the daughter could, of course, successfully claim these moneys if she had at the death of the testator a legal right to them, that is to say, a right at law to recover the moneys from the society, because, although that legal right might have been given to her purely voluntarily by her father, still there would be no resulting trust in favour of the father, seeing that there would be a presumption of advancement. The only other ground upon which the daughter could claim these moneys as against the executors of her father would be that the father in some way constituted himself a trustee for the daughter of the policy and of the moneys payable thereunder.

Then ROMER, J., proceeds to consider portions of the judgment of LORD ESHER, M.R., and of FRY, L.J., in *Cleaver's* case (1), and he comes to the conclusion that there was no trust in that case which was created in favour of the daughter. He says at p. 353:

> It follows from that [the citation from the judgment of FRY, L.J.] that in the present case the daughter could not have enforced this contract in her own name against the insurance company and that she was an absolute stranger to the contract, which could have been put an end to by both of the contracting parties without her assent. It also follows from that decision that the mere fact that the policy moneys are expressed to be paid to somebody other than the assured does not make the assured a trustee of the policy or of the policy moneys for the person so nominated. I might mention that that case was followed in somewhat similar circumstances by EVE, J., in *Re Burgess's Policy* (3).

Then he refers to the decision of JOYCE, J., in *Re Policy No. 6402 of the Scottish Equitable Life Assurance Society* (4), and says, at p. 354:

> In that case, a policy of insurance had been taken out by A on his own life "for behoof of B," and the policy provided that B should be entitled to receive the policy moneys on A's death. It was held that the legal personal representatives of B, who received the moneys on the death of A, were trustees of the policy moneys for the legal personal representatives of A. The actual decision, therefore, is in accordance with the two cases I have already referred to. But the grounds on which

> Joyce, J., based his decision were these. He treated B as the person who had the right at law to enforce the policy and give a receipt for the policy moneys but held that, being a stranger to A and there being no consideration for his so being put into possession of this legal right to enforce the policy, B would hold the policy moneys when received as trustee for A in accordance with the doctrine of *Dyer* v. *Dyer* (5). Coming, therefore, as I do, to the conclusion that the daughter did not acquire any interest at law or in equity to the policy or the policy moneys merely by reason of the fact that the policy moneys are expressed to be payable to her, I still have to consider whether the testator ever constituted himself a trustee for the daughter in some other way. It appears that in the proposal form which the father had to fill up and sign he inserted opposite the words "Full name and description of the proposer" the words "Edward Coryton Engelbach, for his daughter Mary Noel, aged one month," and it is said that by that means he constituted himself a trustee of the moneys payable under the policy. But that point is also, I think, concluded by the authority of *Cleaver* v. *Mutual Reserve Fund Life Assocn.* (1). In the passage in the judgment of Fry, L.J., part of which I read just now, he says [p. 157]: "By the proposal which was made part of the policy he [that is, Mr. Maybrick] expressed the policy to be effected for the benefit of his wife," and he came to the conclusion that, apart from the Married Women's Property Act, 1882, s. 11, that fact would not have constituted Mr. Maybrick a trustee of the policy or the policy moneys for his wife. The only distinction that I can see between that case and the present one is this. In the proposal form Mr. Engelbach, the father, did not say that he was effecting this policy for the benefit of his daughter but said that he was making the proposal for his daughter. It is sought from that to draw the inference that the father was, by this proposal form, stating that he was entering into the contract on behalf of his daughter, not merely for her benefit but was making the whole contract on her behalf. I cannot think that that is the true construction of this proposal form. It appears to me extraordinarily unlikely that a father would purport to enter into such a contract as this as agent for his daughter who was one month old, a contract which involved, if the father and the daughter were to get any benefit out of it, the continuous payment of a premium by the father. I think that the words of the proposal really mean no more in this case than the proposal made in the *Maybrick* case (1) and that the father entered into this contract in his own name and on his own behalf but for the benefit of his daughter.

He concludes by saying that he feels constrained by the authorities to decide against the contention of the daughter. That decision was followed by myself in *Re Sinclair's Life Policy* (6), to which I do not propose to refer at any great length. That was a case in which a man took out an endowment policy in his own name for the benefit of his godson to mature in 17 years. The person who took out the policy died before the godson had attained the necessary age. Thereupon the question arose whether the moneys payable under the policy belonged to the person who had taken out the policy or to the godson. I came to the conclusion in that case, following the decision of Romer, J., in *Engelbach's* case (2), that there was nothing in the case sufficient to create a trust in favour of the godson, and that, consequently, although the assured no doubt intended to benefit his godson, he had not done sufficient to constitute himself a trustee for the godson, and, accordingly, there was nothing which could entitle the godson to the benefit of the policy moneys, which belonged to the person who had effected the policy and had paid the premiums. That really was a case which followed, I think, in principle entirely the decision of Romer, J., in *Engelbach's* case (2). I was not able in that case, any more than Romer, J., was in *Engelbach's* case (2), to find in the terms of the policy or elsewhere anything which created the assured a trustee for the infant. Since then, there has been a case before Crossman, J., and there has been a decision by Simonds, J., but that turned, I think, upon rather different circumstances. In those circumstances, I have to decide this particular case, and, in my judgment, the whole matter rests entirely upon the true construction of the policy in question. I think that one must take it that, unless there is in the policy something which does establish reasonably clearly that the assured was in fact constituting, A and intending to constitute, himself a trustee for the infant of the assurance moneys, the infant is not entitled, and the personal representatives of the deceased are entitled, to the moneys payable. Again, I think I may say that the mere fact that a policy is taken out for or on behalf of an infant is not, in my judgment, alone sufficient to constitute such a B trusteeship. It would be very easy for a person to make clear by the language used that in fact he was constituting himself a trustee, and the absence of any clear words to that effect renders it more difficult for the infant to establish a trust on his behalf, because the mere fact that such plain words, which are easy to use, have not been used is an argument C against any trust at all. However, the policy which I have to consider is one in terms which are quite different from those of any other policy which I have seen before, and there are provisions in it which, I think, differentiate it very much from the policy which I had to consider, for instance, in *Sinclair's* case (6), or which ROMER, J., had to consider in D *Engelbach's* case (2). In the proposal for the policy, under "Particulars respecting the child to be assured," the name of the child is given and the address and the place and date of birth. Then follow certain particulars with regard to the health of the father and mother, and certain questions are answered. Then, under "Particulars respecting the E person making the proposal," there follow the name of the father, his address, his occupation, and the relationship to life proposed to be assured, which is stated to be "Father." Then: "At what age (21 or 25) are options to commence?" Then after that is stated the annual premium—namely, £47 11*s.* 8*d.* Then there is a note as follows:

> F If it is desired that payment of premiums falling due before the child attains age 21 or 25 shall cease in the event of death of proposer, the particulars indicated overleaf should be furnished.

Then follows a declaration which I need not read. Then on the back of the proposal form certain facts are stated with regard to the health of the father and mother, and certain other questions, which I do not G think I need read. Then I turn to the policy. It begins as follows:

> Whereas the person named in the schedule hereto as "the grantee," being desirous of effecting with the Friends' Provident and Century Life Office (herein called "the office") the assurance described in the said schedule on the life on behalf and for the benefit of the person therein named as "the life assured," has delivered to the office the proposal and declaration mentioned in the said schedule as the basis of the contract of assurance herein contained. . . .

H It is to be noticed that the father is the person who is described as the grantee, and the grantee is stated to be desirous of effecting an assurance "on the life on behalf and for the benefit of the person therein named as 'the life assured'"—namely, the child. Then follow the provisions of the policy:

> In consideration of the payment to the office of the first premium and of the subsequent premiums (if any) to be paid as provided in the said schedule the office

> will pay the sum assured mentioned in the said schedule to the person or persons to whom the same is therein expressed to be payable upon proof satisfactory to the directors of the office of (*a*) the happening of the event set forth in the said schedule, (*b*) the title of the person or persons claiming payment; and (*c*) the age of the life assured if it has not previously been admitted. This assurance shall carry and be subject to the privileges and conditions contained in the schedule hereto and endorsed hereon (which are to be deemed part of this policy) and is issued under and subject to the laws and rules of the office. . . .

I do not think that I need read the next paragraph. Then follows a schedule:

> Date of proposal and declaration—Apr. 28, 1934. The grantee—Henry Bertram Law Webb . . . on behalf and for the benefit of the life assured.

Then the life assured is stated to be, "Thomas Roderick Webb, son of the grantee." The date of birth is again stated. Then follows:

> Sum assured—Amount, £6,042 . . . Event on which to become payable—The death of the life assured, provided he/she shall die on or after Dec. 5, 1954 (being the day on which he/she attains the age of 21 years, and herein called "the life assured's 21st birthday"). To whom payable—The personal representatives or assigns of the life assured, subject to special condition 2 below. Where payable—At the London head office.

Then follows a statement about the premiums. There are various rates:

> Period during which payable—Until the death of the life assured, subject to the special conditions below.

Then follows this provision:

> Options at age 21. During the 30 days immediately preceding the life assured's 21st birthday and on his/her behalf the grantee, his personal representative or assigns, may at his or their option exercised by notice to the office:—(1) Terminate the assurance as on the day prior to such birthday and receive a payment in cash of £996 19*s.*

It is to be noticed that the option which is there given is during the 30 days immediately preceding the life assured's twenty-first birthday, and on his behalf the grantee may terminate the assurance on payment to him of a sum of £996 19*s*. I think that it would be difficult to say, in face of the words "on his behalf," that, if the grantee did on behalf of the infant exercise the option and receive that sum, he would not receive that sum on behalf of, and as trustee for, the infant. Then follows this:

> Determine that the assurance shall continue as from such birthday in the form of either an ordinary whole life or an endowment assurance for amounts and subject to payment of premiums as follows. . . .

Then follow the payments of annual premiums, to which I need not refer, and then there are these words:

> If such option be not exercised the assurance will continue in force in accordance with the terms of this policy. Notwithstanding anything hereinbefore contained, until (but not including) the life assured's 21st birthday and on his/her behalf the grantee, his personal representatives or assigns shall have full power to (i) surrender this policy; or (ii) agree to any modification or variation thereof; or (iii) assign or charge the same by way of mortgage or security for any sum not exceeding the surrender value of the policy at the time of such assignment or charge with interest on such sum, and his or their receipt for any moneys paid upon or in respect of any such transaction shall be a good discharge.

Again, it is to be noticed that the power given to the grantee or his personal representatives in that clause is a power to be exercised on behalf of the infant. Then follows this:

> On the 21st birthday of the life assured (if this policy is still subsisting) all rights and powers of the grantee, his personal representatives and assigns, in relation to this policy will cease and the life assured will become solely interested therein and entitled to deal therewith subject nevertheless to any such assignment or charge by way of mortgage or security as aforesaid then affecting the same. . . . The grantee, his personal representatives or assigns, may at his or their option on behalf of the life assured convert this assurance into an assurance for a sum payable in annual instalments as follows. . . .

Then follow the instalments. Thus, again the grantee has a power which he can only exercise on behalf of the life assured. Then in cl. 6 there is a provision as follows:

> If the life assured shall die before his/her 21st birthday there shall be paid to the grantee, his personal representatives or assigns, the sum of £40 5*s*. 8*d*. on account of each year's premium paid in respect of this policy with compound interest thereon at the rate of 2 per cent. per annum.

In other words, if the infant dies under the age of 21 years, the person who has paid the premiums during that period is entitled to recover a part of those premiums. Clause 7 provides as follows:

> If the grantee shall die before the life assured's 21st birthday and all premiums becoming due on or before the date of the grantee's death shall be duly paid, then this policy shall remain in force until (but not including) the life assured's 21st birthday without payment of any further premiums for the period up to (but not including) that day.

Then there are certain privileges and conditions, to which I do not think it necessary for me to refer, except that in (III) there is a provision as follows:

> If it is desired to discontinue the payment of premiums after at least two years' premiums have been paid the assurance will, on application before the expiration of the month of grace, be exchanged for a fully paid-up assurance provided the value is sufficient to secure a paid-up assurance for at least £20.

I cannot help feeling that the person who was responsible for the form and language of that policy must have had somewhere at the back of his mind some recollection of the effect of *Engelbach's* case (2) before ROMER, J. It seems to me that the author of this document—whether or not he succeeded in doing it is a different matter—did certainly design a form of policy which he thought would constitute the man who effected the policy a trustee for the infant in question. Of course, I must bear in mind what ROMER, J., said—namely, that it is unlikely that a person would enter into a contract which bound him to pay premiums on behalf of, and as agent for, an infant of very tender years—and that observation no doubt applies in the present case, but I cannot help feeling that in this case the form of the policy is intended to do exactly what the policy in *Engelbach's* case (2) before ROMER, J., and in *Sinclair's* case (6) before myself did not do—namely, effectively to create a trust in favour of the infant whose life was assured. It is a pity, I think, that, if that was the intention of the parties, it was not quite clearly stated, and it might have been, without giving ground for any possible doubt, by using the words "as trustee," or something like that, to make the position quite clear. However, I think that there is enough in this case. Throughout the policy, the grantee is said to be acting on behalf of the infant. Before the infant attains the age of 21 years, the grantee is given certain powers to surrender or to agree to modification and so on, but, again, those powers are powers which have to be exercised on behalf of the infant, and, if exercised on behalf of the infant by, for instance, surrendering the policy, any money which is so acquired, it seems to me, will be money which belongs to the infant, and not to the grantee, for the reason that it will be a term of the bargain made between him and the insurance company on behalf of the infant, and, as such, will give the infant the right to the money which resulted, rather than the grantee. However, the most striking of all, is the provision that, if the life assured attains the age of 21 years, then any interest which the grantee had in the policy or the moneys secured under it completely disappears. That the grantee had an interest up to that date I think is plain from the fact that, in the event of the infant dying under 21 years, the grantee was entitled to recover a portion of the premiums which he had paid, and any money representing the surrender value would, I think, belong to the grantee, because the grantee parted with the money which was required to keep the policy on foot. As soon as the infant attained 21 years, however, whatever interest the grantee may have had under the policy ceased and determined once and for all. It was then a matter wholly between the insurance company and the life assured as to the future terms. I think that the life assured was the person entitled, in that event, to the money payable under the policy, and the life assured, if there were any further payments to be made, was the person to make those payments. It seems to me, when I consider the whole of the terms of this policy and read it as a whole, that there is in this case sufficient to do that which I thought the policy did not do in *Sinclair's* case (6) before me. That is to say, there is sufficient to establish a trust in favour of the infant as against the father, who no doubt effected the policy, but effected it on behalf of the infant, and on the special terms to which I have referred, which I think do show that the father was contracting, not on his own behalf, or for his own benefit, but wholly on behalf of, and for the benefit of, the infant. In those circumstances, this case is, in my judgment, distinguishable from *Engelbach's* case (2) and *Sinclair's* case (6), and I think that in this case it would be right to make a declaration that the moneys payable under these two policies do belong to the two infants respectively, and not to the estate of the testator.

Declaration that moneys payable under the policies belong to the infant defendants. Costs as between solicitor and client to be paid out of the estate.

Solicitors: *Field, Roscoe & Co.* (for all parties).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

Re GALE, GALE *v.* GALE AND ANOTHER.

[CHANCERY DIVISION (Farwell, J.), **February 18, 1941.**]

Wills—Construction—Gift during widowhood—Beneficiary a spinster—Gift for period which cannot exist.

The testator by his will made provision for his wife, and also directed his trustees to allow D.M.L. the use and enjoyment of a certain dwelling-house "during her widowhood," and to pay her 25*s*. per week out of the residue "during her widowhood for a period of 12 years." D.M.L., who had four children by the testator, had never been married, but was known as Mrs. L. :—

HELD : both gifts failed, as they were given for a period which could never exist.

[**EDITORIAL NOTE.** If the strict meaning of words is to be followed, it is clear that a woman who has never been married cannot be the widow of anyone. However, the Court of Appeal in *Re Wagstaff, Wagstaff* v. *Jalland* (1) found it possible to avoid a similar difficulty upon the facts of that case, and the real question here is whether the construction of the will here considered is governed by that case or by the decision in *Re Boddington, Boddington* v. *Clariat* (2), which was to the opposite effect.

AS TO GIFTS DURING WIDOWHOOD, see HALSBURY, Hailsham Edn., Vol. 44, p. 327, para. 376 ; and FOR CASES, see DIGEST, Vol. 44, pp. 872-875, Nos. 7283-7310.]

Cases referred to :

(1) *Re Wagstaff, Wagstaff* v. *Jalland*, [1908] 1 Ch. 162 ; 44 Digest 874, *7309*; 77 L.J.Ch. 190 ; 98 L.T. 149.

(2) *Re Boddington, Boddington* v. *Clariat* (1883), 22 Ch.D. 597 ; 44 Digest 874, *7308* ; 52 L.J.Ch. 239 ; 48 L.T. 110 ; *on appeal* (1884), 25 Ch.D. 685.

(3) *Rishton* v. *Cobb* (1839), 5 My. & Cr. 145 ; 44 Digest 220, *442* ; 9 L.J. Ch. 110.

SUMMONS to determine whether Dorothy Marie Laing should be entitled to the enjoyment of 38, West Mount Street, Beeston, Leeds, and the sum of 25*s*. per week as directed by the will of George Henry Gale. The testator made his will on Mar. 11, 1938. He died on Dec. 4, 1938, and probate of his will was granted on Feb. 1, 1939. The facts are fully set out in the judgment.

E. Russell Gurney for the plaintiff.

J. A. Wolfe for the first three defendants, the widow and children.

D. Armstead Fairweather for the fourth defendant.

FARWELL, J. : This summons raises a curious point of construction on the will of George Henry Gale. The will was made on Mar. 11, 1938, and the testator died on Dec. 4, 1938. When the testator came to make his will, he apparently had it in mind to make some provision both for his wife and for Dorothy Marie Laing, with whom he had cohabited. The will is in these terms. He appoints executors and trustees, and then he gives :

. . . all that my dwelling-house and premises situate and being No. 8 Talbot Gardens aforesaid together with all the furniture plate linen china glass books prints pictures and all other my household effects in and about the said dwelling-house at the time of my decease unto my trustees upon trust that my trustees shall allow my wife to have the use and enjoyment thereof during her life she nevertheless paying all rates and taxes . . .I give and devise all that the dwelling-house situate and being No. 38 West Mount Street Beeston in the city of Leeds to my trustees in trust to allow Dorothy Marie Laing of that address to have the use and enjoyment thereof during her widowhood [she making certain payments] I give devise and bequeath all the residue of my estate both real and personal . . . unto my trustees [upon the usual trusts for sale and conversion and for payment of testamentary expenses and debts] and upon trust to pay out of the income of my residuary trust fund to my said wife the sum of £2 per week during her life and subject thereto to pay to the said **A** Dorothy Marie Laing the sum of 25*s.* per week during her widowhood for a period of 12 years and to pay the balance (if any) of such income to my said wife during her life provided always and I hereby declare that from and after the death of my said wife my trustees shall sell my said dwelling-house No. 8 Talbot Gardens and my said furniture (but with power at their discretion to postpone such sale and conversion) and the proceeds of such sale and conversion shall fall into and form part of my residuary trust fund and subject to the said weekly payment of 25*s.* per week to the **B** said Dorothy Marie Laing I direct my trustees to pay and divide such residuary trust fund together with any accumulated income thereof unto and equally between my three children the said Doris Grant Harold Gale and George Stanley Gale.

Then there is a proviso :

. . . whenever the payment to the said Dorothy Marie Laing of the said sum of 25*s.* per week shall cease to be payable then the same and the investments out **C** of which such income is payable shall fall into and form part of my residuary trust fund and be divisible accordingly.

Then there are certain other provisions which I need not read.

There is no doubt whatever as to the facts in this case, and, in truth, Dorothy Marie Laing has made an affidavit in which she has stated quite frankly the position between herself and the testator. She said : **D**

I am a spinster of 46 years of age. I have four children and I am known in the district where I live as Mrs. Laing. I have fostered the belief that I am a married woman for the sake of my children.

Then she says that the testator had known her since she was about 20 years of age, when she was employed by him at a picture house which he **E** owned. She says that she became intimate with him, that he was the father of her children, and that he knew that she had in fact never married. Then she makes certain observations with regard to a house in which she lived in Leeds, which I need not read. On the evidence, there is no question whatever but that Dorothy Marie Laing was not the wife of the **F** testator. In fact, the testator had a wife who survived him, and for whom he made some provision by his will. The question which arises is this : Does Dorothy Marie Laing take any benefit under the will at all, having regard to the fact that the benefit which she is given in respect of the house in Leeds is " the use and enjoyment thereof during her widowhood " **G** and that the payment of 25*s.* per week is " during her widowhood for a period of 12 years " ? It is said that the gift to her " during her widowhood " must mean a gift for a period terminating on her marriage—that is, a gift subject to a condition in general restraint of marriage. Such a condition, it is said, is void, and, the condition failing, there is a gift for **H** life. On the other hand, it is said that neither of those gifts can take effect at all, because the period which is named in the will is " during her widowhood," and that is a period which has never come into existence at all, she never having been married, and that, in those circumstances, neither of the attempted gifts to her which are made by this will can take effect, and she gets no benefit at all. I have been referred to two cases which have some little resemblance to the present case, both of which are decisions of the Court of Appeal. One of them is *Re Wagstaff, Wagstaff* v. *Jalland* (1), in which the Court of Appeal, affirming KEKEWICH, J., came to the conclusion that the gift in that case was good. The headnote reads as follows:

> A testator gave all his furniture, household goods and effects to his "dear wife D. J. Wagstaff"; and after various pecuniary legacies devised and bequeathed the residue of his real and personal estate to his "said wife" and two other persons upon trust for sale and to invest and pay the interest and annual produce thereof to "my said wife during her life if she shall so long continue my widow," and after her decease or second marriage, upon trust, in the events which happened, for the plaintiff. The lady whom the testator thus described as his "wife," and with whom he went through the ceremony of marriage in 1893, was at that time the wife of A. G. Jalland, to whom she had been married in 1884, and who was still living:
>
> HELD, on the evidence, that the testator knew at the time he went through the ceremony of marriage that the lady was then the wife of A. G. Jalland, and, consequently, that upon the true construction of this will she was entitled to a life interest in the residuary estate unless and until she contracted a marriage subsequent to the death of the testator.

In that case, the Court of Appeal reached their conclusion in this way. LORD COZENS-HARDY, M.R., said, at p. 165:

> "And upon or after her decease or second marriage"—then over. Now, what does that mean? Surely it means this: "I give the income of my residuary estate to be received by the lady with whom I went through the form of marriage at St. George's, Hanover Square, during her life, if she shall so long continue my widow, for her own use and benefit, and upon her decease or second marriage, then over." He has himself interpreted it by the words "continue my widow" there—"continue my widow until she marries again." Given his knowledge of the facts, I am bound to say that I think the learned judge, in the declaration which he made on the construction of this will, was perfectly right, and that this lady is entitled to the income of the estate during her life or until her second marriage. If I wanted any aid to the interpretation in the body of the gift, I should certainly find it in the language of the gift over. The property is given over only upon her decease or upon her second marriage.

Then FARWELL, L.J., who agreed with that decision, said, at p. 166:

> On the question of construction it is legitimate and usual for the purpose of construing a gift in a will to refer to the gift over which operates to defeat or determine that gift. The cases on the word "survivors" show how important the gift over is. Here the testator knew that he had gone through the ceremony of marriage with a lady who had been before married; therefore when he speaks of a second marriage he knows that is not an accurate phrase, but he means her future marriage. Then he says she is to have the income so long as she continues his widow, with a gift over on her future marriage. Reading the two together, he means that she shall continue to receive the income until she goes through a further, a future, ceremony of marriage, and in that event the estate shall go over. When one analyses the construction put by the appellant on these words it is to my mind almost extravagant. They contend that the testator has said, in the words of the psalmist, "This lady is to have this income 'until my abominable sin shall be found out.'"

The other case, which is perhaps in some ways a little closer to the case which I have to consider here, is *Re Boddington, Boddington* v. *Clariat* (2), where the Court of Appeal came to a contrary view. The headnote is as follows:

> A testator by his will gave the proceeds of sale of his residuary estate to trustees, on trust to pay to his wife E.C., within one month after his decease, a legacy of £200, and in addition thereto to pay to his said wife, "so long as she shall continue my widow and unmarried," an annuity of £300, commencing from the date of his decease, "or otherwise in lieu and in substitution of the said annuity, at the option of my said wife, if she shall prefer it, a legacy of £2,000. And I direct that the provision hereby made for my said wife shall be in lieu and satisfaction of any dower or thirds to which she might be entitled out of my estate." After the date of the will the

> marriage was, in a suit in the Divorce Court instituted by the wife, declared void *ab initio*, on the ground of the impotency of the testator. He died without altering his will :—
>
> Held, that the late wife was entitled to the legacy of £2000, but that she could not claim the annuity inasmuch as she, never having been in law the wife of the testator, never could be or continue his widow, and the annuity was therefore given for a period which could never come into existence.

That was a decision of Fry, J., and in his judgment he says, at p. 602 :

> Then arises the question whether she is entitled to the annuity of £300, given to her " so long as she shall continue my widow and unmarried." It appears to me that the annuity is given to her for a period which can never come into existence. She never was the testator's widow, and therefore she can never continue his widow for any length of time. On principle, therefore, I am unable to see how an annuity for a non-existing period can possibly be claimed. The only doubt in my mind has arisen from the case of *Rishton* v. *Cobb* (3), to which I have already referred.

Then he makes a reference to that case, and he holds that, notwithstanding that decision, in the case before him the woman was not entitled to the annuity, because it was given to her for a period which could never have any existence in fact. That decision was affirmed by the Court of Appeal, and the principal judgment in that case was that of Lord Selborne, L.C., who said, at p. 687 :

> But on the point of law I think that the construction of this will, supposing there had been no authority on the subject, is reasonably plain. The words are these : " And in addition thereto to pay to my said wife so long as she shall continue my widow and unmarried an annuity of £300 by equal quarterly payments commencing from the date of my decease." These words appear to express, as plainly as language can, that the status of widowhood is a condition of the inception and a measure of the duration of the gift. For my own part I have no difficulty in saying that these words make it clear that she cannot take the annuity at all unless she is the testator's widow, and that if at any time she ceases to be his widow she ceases to be entitled to it. It was ingeniously contended that if the word " unmarried " had been alone used, it would, if the lady had been the testator's wife at his decease, have come to the same thing as the words which the testator has used. Perhaps that may be so, but one must remember that the moral obligation to make provision for a widow depends upon the fact that she is the testator's widow. Therefore the word "widow' must be regarded as the principal word here, and the word " unmarried " must be regarded as only added *ex cautela*, as I should think, to show that though in some cases and for some purposes rights acquired by a widow as such might continue after her second marriage, it was not intended to be so here.

Therefore, he comes to the conclusion that Fry, J., was right in interpreting that the gift to the lady in question could not take effect. Those cases, of course, are not on all fours with the case which I have to determine. In the second case, at the time when the will was made, the lady was a person who was recognised as the wife of the testator. By the time of the death, she had ceased to be a person who was so recognised, and in fact the marriage had been declared void *ab initio*, so that she never was in fact the widow of the testator. In the other case, the lady never was the wife of the testator at all in any circumstances. She went through a ceremony of marriage with the testator when she herself had a husband alive, and, therefore, she never was married to the testator at all. When the testator went through the ceremony of marriage, he was aware of the fact that he was committing bigamy, and, when he came to make his will, he gave to the lady, describing her as his wife and then putting her name—first of all the initials and then " Wagstaff "—an interest for life, and provided for her when she became a widow.

The court in that case came to the conclusion that, when he used the word ".wife," he was using it in connection with the name as indicating a particular person, who could be ascertained beyond all doubt. That was the person to whom the benefit had been given, and the court came to the conclusion that the gift took effect, notwithstanding that the lady was described as his wife, and continued during her so-called widowhood, meaning thereby the period from the death of the testator until she either died or married again. In those circumstances, the gift took effect. Having those two decisions in mind, what construction am I to put upon this particular will ? The testator made it quite clear in the will itself that he was under no delusion as to his relationship to Dorothy Marie Laing, because he made a gift in the will itself to the lady who was in fact his wife. Thus, there is no difficulty about ascertaining who is the person described as Dorothy Marie Laing. That he did intend that she should have some provision made for her under this will is, I think, reasonably plain, but has the testator made that provision in terms which entitle her to enjoy it ? That is the whole question. If I am to read this will in the light of what the Court of Appeal said in *Re Boddington, Boddington* v. *Clariat* (2), the period during which she is to enjoy these benefits is one which does not exist at all, and never could come into existence, because she never could become, in any circumstances, the widow of the testator. Therefore, if one takes the decision in *Re Boddington, Boddington* v. *Clariat* (2), it must follow that this gift is in fact not effective at all, since it is a gift for a period which never could have existed and never has existed. In the same way, the payment to Dorothy Marie Laing of the weekly sum is a payment for a period which never could come into existence at all. On the other hand, it is said that here is a gift to a person in terms which indicate that it is for a period which is to begin at the death of the testator and is to continue until the marriage of Dorothy Marie Laing, and that that is a gift subject to a condition that she ceases to be entitled on her marriage. Such a condition, it is said, is void as being against public policy and, therefore, her enjoyment of the house would not be terminated by her marriage. So far as the money payment is concerned, it is said that there again it would not be terminated since the condition is in general restraint of marriage. In my judgment, in this case I am bound to say that I ought to follow the decision in *Re Boddington, Boddington* v. *Clariat* (2). It seems to me that the principle of that decision does apply in this case. Here there is a gift to a person for a period which, in fact, can never exist at all. The commencement of the period is something which can never happen. That is to say, there never can be any period during which the beneficiary is or was the widow of the testator, and all she is given is an interest during her widowhood. Applying the decision in *Boddington's* case (2), which is a decision of the Court of Appeal and binding upon me, so far as it is relevant, it seems to me that I am bound to say that this lady is given benefits during a period which in fact has no existence whatsoever. I think that, if the testator had been consulted, he would have said that he did not intend to leave her without any provision at all, but he has used language in his will which I think has that effect. The result is that she is not entitled either to the interest which he attempts to give A her in the house in question or to the weekly payment provided by the latter part of the will.

Costs as between solicitor and client to come out of the estate.

Solicitors: *Corbin, Greener & Cooke*, agents for *Pullan, Davies & Co.*, Leeds (for the plaintiff and for the first defendant); *J. H. Milne & Son* B (for the second defendant).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

ADAMS *v.* ADAMS.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **January 27, 28, 29, February 24, 1941.**]

Husband and wife—Marriage—Annulment—Separation agreement entered into prior to annulment—Whether provision made for wife in the agreement enforceable. E

The appellant married the respondent in 1936. The following year the parties separated and a common form separation agreement, dated October 11, 1937, was signed. It provided that the appellant should pay his wife £1 weekly during their joint lives. In Mar., 1940, the appellant was F granted a decree *nisi* of nullity on the ground of his wife's incapacity. This decree was made absolute. The appellant then ceased to make the payments provided for by the agreement and the respondent commenced these proceedings claiming the arrears. The husband contended that, after the decree of nullity, payment of the sums secured by the deed could not be enforced, as the deed was based on the validity of G the marriage, whereas it had been decided that there was no marriage at all:—

Held: the decree of nullity based on incapacity had no effect upon the separation deed and the covenant to pay the weekly sums thereby secured was still enforceable.

[**EDITORIAL NOTE.** The judgments herein consider at length a matter which H has been before the courts before, and was, in effect, decided in *Charlesworth* v. *Holt* (1) as long ago as 1873. That case was approved in the Court of Appeal on two occasions, and the court in the present case has refused to depart from a line of authority so firmly established. It should, however, be noted that that case was concerned with a decree of divorce, whereas the decree in the present case was one of nullity. The effect of a decree of nullity was, however, considered in *Fowke* v. *Fowke* (7), and the decision herein approves the judgment of Farwell, J., in that case.

As to Effect of Nullity Decree, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640, 641, para. 937; and for Cases, see DIGEST, Vol. 27, pp. 265, 266, Nos. 2326-2345.]

Cases referred to:

(1) *Charlesworth* v. *Holt* (1873), L.R. 9 Exch. 38; 27 Digest 232, *2039*; 43 L.J.Ex. 25; 29 L.T. 647.
(2) *Turner* v. *Thompson* (1888), 13 P.D. 37; 11 Digest 332, *214*; 58 L.T. 387.
(3) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, *5048*; 58 L.J.P. 73; 60 L.T. 654.
(4) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488; 12 Digest 610, *5042*; 60 L.J.Q.B. 734; 65 L.T. 286.
(5) *May* v. *May*, [1929] 2 K.B. 386; Digest Supp.; 98 L.J.K.B. 770; 141 L.T. 629.
(6) *Hyman* v. *Hyman*, [1929] A.C. 601; Digest Supp.; 98 L.J.P. 81; 141 L.T. 329.
(7) *Fowke* v. *Fowke*, [1938] Ch. 774; [1938] 2 All E.R. 638; Digest Supp.; 107 L.J.Ch. 350; 159 L.T. 8.
(8) *P.* v. *P.*, [1916] 2 I R. 400; 27 Digest 528, case 5704 *i*.
(9) *Law* v. *Harragin* (1917), 33 T.L.R. 381; 27 Digest 224, *1949*.
(10) *Galloway* v. *Galloway* (1914), 30 T.L.R. 531; 27 Digest 224, *1948*.
(11) *Eaves* v. *Eaves*, [1939] P. 361; [1939] 2 All E.R. 789; Digest Supp.; 161 L.T. 119.
(12) *Newbould* v. *A.-G.*, [1931] P. 75; Digest Supp.; 100 L.J.P. 54; 144 L.T. 728.
(13) *Dormer* (*otherwise Ward*) v. *Ward*, [1901] P. 20; 27 Digest 521, *5629*; 69 L.J.P. 144; 83 L.T. 556.
(14) *Re Wombwell's Settlement, Clarke* v. *Menzies*, [1922] 2 Ch. 298; 27 Digest 457, *4752*; 92 L.J.Ch. 18; 127 L.T. 295.
(15) *Dunbar* (*otherwise White*) v. *Dunbar*, [1909] P. 90; 27 Digest 501, *5365*; 78 L.J.P. 35; 100 L.T. 380.
(16) *Dodworth* v. *Dale*, [1936] 2 K.B. 503; [1936] 2 All E.R. 440; Digest Supp.; 105 L.J.K.B. 586; 155 L.T. 290; 20 Tax Cas. 285.

Appeal by the defendant from a decision of His Honour Judge Engelbach, dated Dec. 19, 1940, sitting at Shoreditch County Court. The grounds of the appeal were (i) that the judge was wrong in law, (ii) that the separation agreement was frustrated and of no avail after Sept. 27, 1940, when the marriage of the appellant and respondent was declared to be, and to have been, absolutely null and void, and (iii) that the agreement was made under the mutual mistake of believing in the existence of a marriage.

Valentine Holmes for the appellant.
S. Seuffert for the respondent.

Holmes: The county court judge based his decision on *May* v. *May* (5). That was a divorce case, whereas this is a decree of nullity. *May* v. *May* (5) does not decide the question here. The wording of the decree of nullity accurately sets out the position. The wife reverts to the status of an unmarried woman. The whole basis of the agreement sued on was that there was an existing marriage, but the nullity decree declares that there never was a marriage in fact. The money was stated to be payable to the wife, but there was no wife. [Counsel referred to *Eaves* v. *Eaves* (11), *Newbould* v. *A.-G.* (12), *P.* v. *P.* (8), *Dormer* (*otherwise Ward*) v.

Ward (13), *Re Wombwell's Settlement, Clarke* v. *Menzies* (14), *Fowke* v. *Fowke* (7), *Law* v. *Harragin* (9) and *Galloway* v. *Galloway* (10).]

Seuffert : There was here a marriage *de facto*, which afterwards turned out to be voidable. An agreement made before the marriage was avoided must hold good. The wife's position has been affected. She might have defended the nullity petition if she had not been relying on the separation agreement. [Counsel referred to *Dunbar* (*otherwise White*) v. *Dunbar* (15) and *Dodworth* v. *Dale* (16).]

SCOTT, L.J. : This county court appeal from His Honour JUDGE ENGELBACH raises a question of some importance as to the effect of a decree absolute of nullity in the Divorce Court upon an agreement for separation made between the appellant as husband and the respondent as wife. The order below was for payment by the husband to the wife of £7 arrears of weekly payments at the rate of £1 per week due under the agreement, with costs. The appellant, a sergeant in the police force, who appeared in person below, there contended that the decree had discharged the separation agreement, but the county court judge rejected that contention.

The marriage took place on Apr. 11, 1936. The separation agreement was executed by the husband on Oct. 11, 1937. The husband's petition for a decree of nullity was lodged on July 15, 1938. The case was not defended, and a decree *nisi* was made on Mar. 11, 1940, on the ground of the incapacity of the respondent to consummate the marriage. It was followed by a decree absolute on Sept. 23, 1940. There was nothing unusual in the separation agreement. It recited unhappy differences and a mutual agreement to live apart, and it recited that the husband had agreed to pay to the wife :

> . . . £1 a week for and towards her maintenance and support during the joint lives of himself and the wife (subject nevertheless as is hereinafter mentioned) during the continuance of these presents and so long as the wife shall remain chaste and shall observe and perform the agreements and stipulations herein contained and on her part to be performed.

It contained (i) permission to the wife to live separate and apart and free from marital control without interference from the husband (ii) a mutual non-molestation clause, (iii) a *dum casta* promise by the husband to pay the £1 per week " during the continuance of these presents," (iv) leave to the wife to keep her clothes, etc., (v) an undertaking by the wife to indemnify the husband against her debts, and (vi) leave to the husband to deduct from the weekly payments any debts of hers which he might be called upon to discharge.

Before us, counsel for the appellant in substance submitted two contentions. First, he laid stress on the ecclesiastical history of the decree of nullity, pointing out that the remedy was invented by the Church, which, holding marriage to be indissoluble, could not grant divorce, and instead granted a declaration that there never had been a marriage ; that our statute law adopted the law of the Church ; that the effect of the decree of nullity is to avoid a marriage *ab initio;* that that effect distinguishes the decree of nullity from a decree of divorce; and he argued, accordingly, that the appellant's separation agreement was discharged by act of law. Secondly, he contended alternatively that the contractual basis of the agreement was the existence of the marriage relationship, and that, as by the retrospective operation of law there was at that date no marriage in existence, the basis had disappeared, and with it the contract which rested on it. He did not quite submit that the doctrine of frustration applied, though he did use that doctrine by way of analogy. Whilst not purporting to attack the principles of interpretation expressed by the court in *Charlesworth* v. *Holt* (1) about the separation agreement before that court, he did submit that the terms of the agreement before us, properly interpreted, disclosed an intention that it should only apply if and so far as the status of marriage attached to the parties, although he concurred that completed acts under it, such as past weekly payments, could not be reopened. The ground of distinction he sought to draw was again the difference between a nullity decree and a divorce.

I am not convinced by these arguments, but, before stating my reasons for dismissing the appeal, I wish to dispose of any notion that a hardship must necessarily result from a decision that the decree of nullity left the appellant bound by the agreement of separation. On the decree absolute, either party could then have applied to the court to vary its terms, treating it as a post-nuptial settlement within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, and even now there is no statutory bar to the appellant making an application by the leave of the judge under r. 41 (1), and, in the circumstances of the case, the judge might perhaps exercise his discretion in spite of the delay.

Before discussing the interpretation of the separation agreement, upon which, in my opinion, the appeal really turns, it is desirable to clear the ground on two points. In the first place, no impossibility supervened, either in fact or in law, to prevent performance by the appellant of his promise to pay the respondent £1 per week. If he was by the decree relieved of that obligation, it was on some other ground. In the second place, until the decree absolute, the status of husband and wife continued to attach to the appellant and respondent, and, although, from the time when he first discovered her incapacity to consummate, he possessed a legal right to get the marriage annulled, it remained in law an effective marriage until he got his decree. Some confusion has been caused, in legal discussion upon the difference between a decree of nullity and a decree of divorce in regard to their retrospective effects upon the pre-existing marriage, by the use of the words "void" and "voidable." It has been said that, in the case of divorce, it is good law to speak of the marriage as having been voidable, but that it is not so in the case of nullity, for there the decree pronounces the marriage to have been "void" from the outset. Primarily, the use of those two words is a metaphor from the law of contract, and is not truly appropriate to the law of status, but the use of both terms in connection with the status of marriage has received judicial sanction, and is consonant with the ordinary English meaning of the words, although it lends itself to misuse, and may cause confusion. Counsel for the appellant was, no doubt, right in his history. Dissolution of marriage being impossible to the Church, original nullity preventing its validity at the start was the only ground on which the ecclesiastical courts could annul a marriage. Hence came our own law of nullity and the present form of the decree. However, it does not follow from the history of the jurisdiction that, after decree of nullity, it is legally right to look back and say that the marriage was always and for all purposes void and at no time existed in the eye of the law. That may or may not be true of a bigamous marriage, or where the parties are so related in blood as to fall within the prohibited degrees, but it is not true of a marriage where one spouse is entitled to get a decree of nullity on the ground that the marriage is incapable of consummation. In such a case, the marriage is valid for most purposes. It is not void, but is only voidable, as has been said judicially in several cases, for example, by Sir James Hannen, P., in *Turner* v. *Thompson* (2), at p. 41. The concession of counsel for the appellant that completed acts attributable to the marriage relationship cannot be undone after or as a result of the decree of nullity really carries the necessary consequence that, until decree, the marriage is only voidable, and it exposes the fallacy underlying his argument that the separation agreement was never effective in law, because at its date the marriage was to be deemed, by reason of the subsequent decree, to have been non-existing. The legal reality is that, in the sense in which the words "voidable" and "void" have been used about marriage in our jurisprudence, the marriage was not then void, but was valid though voidable at the instance of the appellant. It follows that the separation agreement was, when made, a valid act *inter partes*, and continued such until the decree. If so, I can see no general principle in the law of nullity for differentiating its effects in that respect from those of the law of divorce. In other words, the separation agreement in the present case was not discharged by act of law.

What defence, then, is left to the appellant, if he was not discharged from performance either by an act of law or by impossibility of performance? Unless, on the true construction of the contract, we can find in it a provision, express or implied, that the continuance of the marriage status was to be a condition precedent to the recurrent obligation of payment, the appellant can have no answer to the action of debt for the arrears. I altogether fail to discern the least ground for inferring any such condition. It is no doubt plain from the express terms that both parties, when making the agreement, contemplated the continuance of the marriage, but mere common expectation falls far short of agreement amounting to any such condition. Clause 3 is a "simple" or absolute promise of payment, quite unqualified. A condition could very easily have been inserted in it if the parties had intended it. I can see no ground for implying it. Even if I thought that the parties may have intended it, which I do not, that would not suffice. We must be satisfied that they must have intended it, if we are to read it in. We cannot say that it is a necessary implication, and, therefore, we cannot imply it. The general principle applies : *The Moorcock* (3) and *Hamlyn & Co.* v. *Wood & Co.* (4).

The truth is that the question of the condition said to be contained by implication in this separation agreement is the very same question as arose in *Charlesworth* v. *Holt* (1), and has arisen in all the cases where the view expressed in *Charlesworth* v. *Holt* (1) has been affirmed. I can see nothing in this agreement to differentiate it from the common form of separation agreement, and, for present purposes, the agreement which was the subject of decision in *May* v. *May* (5) was similar. In *May* v. *May* (5) and in *Hyman* v. *Hyman* (6), *Charlesworth* v. *Holt* (1) was approved, and the implication of any such condition was definitely negatived : *per* LORD ATKIN in *Hyman* v. *Hyman* (6), at p. 607. On the question of discharge of the separation agreement, either by act of law or by an implied condition, when a decision of nullity for physical incapacity is pronounced, those decisions as to the effect of a divorce may not be technically binding on us, but, on the question of an implied condition of defeasance, I can see no reason why they should not apply, and, even if I did not hold the opinion—which I do hold—that in the separation agreement before us there is no justification for implying such a condition, I should consider myself bound to follow those decisions and expressions of opinion. However, there is one decision which is directly in point, though not binding upon this court, and that is that of FARWELL, J., in *Fowke* v. *Fowke* (7). He there took the same view as that which I have already expressed of the bearing of a decree of nullity for physical incapacity upon a separation agreement. I agree with his judgment.

I think it right to add a few observations on an Irish case, *P.* v. *P.* (8), as counsel for the appellant relied both on the decision and on the reasoning of the judgments. Emphasis was there laid on the language of the decree of nullity, which declared :

> . . . the form of marriage was and is null and void, and that the petitioner is free from all bond of marriage with the respondent.

However, the case is subject to two comments. In the first place, the transaction which the court avoided at the suit of the " wife " had been effected before, and in consideration of, the intended marriage, which the court held void by reason of the husband's impotency. It was in the nature of a dowry brought to the intended husband by the intended wife, and in substance was an ante-nuptial settlement. In the second place, the court, whilst in effect restoring to the " wife " the major part of what she had brought in, did not attempt to undo the part of the transaction which had been carried out and completed after the marriage by the husband using it as cash. The decision is no authority on a post-nuptial settlement, as the separation agreement in the present case should, in my opinion, be regarded. Nor is it an authority for the proposition that, where the ground of nullity is a party's incapacity to consummate, acts done during a so-called void marriage can be undone by a decree of nullity. For these reasons, I think that the county court judge was right, and that the appeal should be dismissed with costs.

Clauson, L.J. [read by Goddard, L.J.]: On Oct. 11, 1937, Ernest Adams agreed with Kathleen Adams, who had been married to him in 1936, but was in fact at the date of the agreement living apart from him, to pay her £1 per week during their joint lives, so long as she should remain chaste and observe certain stipulations of the character commonly inserted in deeds of separation. On Sept. 23, 1940, a decree absolute was pronounced in a nullity suit brought by Ernest, on the ground of the incapacity of Kathleen to consummate the marriage. The decree declared that the marriage was, and always had been, null and void.

In Oct., 1937, Kathleen sued for arrears of the £1 per week, partly in respect of weeks preceding the decree and partly in respect of weeks subsequent to the decree. The county court judge gave judgment in favour of Kathleen for the whole of these arrears. In this court, it was not contested that the judgment was correct in so far as it related to arrears accruing before the date of decree. It was, however, strenuously contended that the judgment should be reversed in respect of arrears accruing after the decree. The county court judge based his judgment on the ground that he ought not to imply into the agreement a term limiting Ernest's obligation to pay the £1 per week to the continuance of the marriage. In my judgment, this decision was correct, and the appeal should be dismissed with costs.

Before us, much emphasis was placed on the fact that the decree absolute must be treated as having wiped out the marriage altogether, and it was suggested, as I understood, that the basis of the agreement was the assumed present existence, and the contemplated future existence, of a marriage which, in view of the decree, must be taken never to have existed. It was argued that, in consequence, the obligation entered into by Ernest was no longer enforceable. It was also suggested that, on the true construction of the document, read in the light of the fact that the parties, though described as husband and wife, must now be taken not to have been husband and wife at the time of the agreement, the document must be treated as limiting Ernest's liability to the period of the marriage. It was also somewhat faintly urged that there was mutual mistake as to the existence of a marriage. In reference to this last point, I will say no more than that this point does not seem to have been suggested to the county court judge, nor, indeed, do I see how it could have been reasonably suggested to him on behalf of a litigant who (although it is true that the county court judge does not believe his story on the point) appears to have alleged in his evidence that, when they in fact separated prior to the execution of the agreement, he and Kathleen had agreed that he should take nullity proceedings, based, as it would seem, on her refusal to consummate the marriage. It was also suggested that the doctrine commonly known as frustration was of some assistance to the defendant. Frustration must flow from some subsequent event, which in this case must be the establishment of the nullity of the marriage. It was not suggested that this fact nullified the advantages gained by Ernest during the period between the contract and the decree by reason of Kathleen's covenant to indemnify him against his liabilities, a covenant admittedly operative during that period. Nor was it suggested that this fact put any difficulty in the way of Ernest continuing his payments. Nor was it suggested that it in any way nullified the advantages accruing to Ernest during the period subsequent to the decree by reason of Kathleen's covenants not to molest him and so forth. However, the event causing the alleged frustration—namely, the making of the decree—was admittedly brought about by Ernest's volition, and could not (against Kathleen's will) have been brought about save by Ernest's volition. It is new to me that a defendant can rely on frustration by reason of an event brought about purely by his own volition.

The truth is that the only plausible defence is that the document, on its true construction and having regard to the circumstances existing at the date of the contract, cannot reasonably be construed so as to place Ernest under a liability to pay except while Kathleen is under coverture. I can see no reason for placing any such artificial meaning on the document. The document is quite plain and clear as it stands, and bears a completely intelligible and reasonable meaning if construed literally. If it had been intended that it should have the suggested restricted operation, nothing could have been easier than to insert limiting words. The matter is free from the complication which sometimes arises in cases of the construction of commercial documents, where there is evidence that the parties were contracting by reference to some course of dealing or commercial custom so notorious that they may fairly be supposed to have mutually intended that the contract must be construed in the light of such a reference.

An argument which in principle appears to me to be indistinguishable from that put forward by the appellant was raised in the Court of Exchequer in *Charlesworth* v. *Holt* (1) on the construction of a similar document, and was rejected, after argument by very distinguished counsel, by a strong bench of that court. I am of opinion that the like argument was properly rejected by the county court judge, and should be rejected by us. If we accepted it, we should in effect be overruling a case which has stood in the books as an authority for many years, and was accepted as correct by this court in *May* v. *May* (5). In my opinion, *Charlesworth* v. *Holt* (1) was decided on a correct principle, and its principle is binding upon us, and completely justifies the decision of the county court judge.

Goddard, L.J.: Unless this case can be distinguished from *May* v. *May* (5), which is binding on this court, it follows that the judgment of

the county court judge was right. That case approved the decision in *Charlesworth* v. *Holt* (1), in which a separation deed, indistinguishable for present purposes from that which we now have to construe, was held to operate, not only during the continuance of the married state, but also after the marriage had been dissolved. It was sought to distinguish this A
case, on the ground that here there has been a decree of nullity, which in terms declares that there never has been a valid marriage between the parties. The decree was granted by reason of the incapacity of the wife to consummate the marriage, and it was, therefore, a case of what has always been described as a voidable, and not of a void, marriage. Such a B
marriage is good and valid unless and until the assistance of the court is sought, or, as would have been said before 1857, the office of the judge had been promoted, and a decree obtained. A sentence or decree always has been, and is, as necessary to annul a marriage on this ground as to dissolve it for adultery or cruelty. Until decree, the parties have the C
status of married people, with all the rights and liabilities consequent thereon. The husband is obliged to maintain his wife, and she has the right to pledge his credit for necessaries. While that obligation and right were subsisting, the parties separated, and the husband covenanted to make a periodical payment to his wife during their joint lives, not for the D
period during which she remained his wife. In my opinion, therefore, the reasoning on which *Charlesworth* v. *Holt* (1) was based exactly applies to the present case. I think that it is unnecessary to deal with the case at greater length, because the exact point fell to be decided in *Fowke* v. *Fowke* (7), and I entirely agree with the judgment of FARWELL, J., E
in that case, and can add nothing to it. It may be pointed out, however, that, if a husband enters into a separation deed in ignorance of the fact that his marriage was void—because, for instance, the marriage was bigamous, or the parties were within the prohibited degrees of affinity, and he did not know of the impediment—the deed is void, as was decided F
in *Law* v. *Harragin* (9), following *Galloway* v. *Galloway* (10). These cases proceed on the ground of mistake, but there can be no mistake where a decree of nullity is obtained on the ground of incapacity after a separation, as the petitioning spouse *ex hypothesi* can have no greater knowledge of the facts when he or she petitions than when they separated. G

Appeal dismissed with costs.

Solicitors: *Wontner & Sons* (for the appellant); *Ludlow & Co.* (for the respondent).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Applied. ROBERTSON *v.* MINISTER OF PENSIONS. [1948] 2 All E.R. 767.

PEASE AND PARTNERS, LTD. *v.* BIRCH.

[COURT OF APPEAL (Scott, Clauson and Goddard, L.JJ.), **February 3, 4, 5, 24, 1941.**]

Workmen's Compensation—Industrial disease—False statement in writing by workman that he had not suffered from miner's nystagmus—Payment of compensation with notice that workman had previously suffered—Statutory agreement—Jurisdiction to make award in spite of misrepresentation—Workmen's Compensation Act, 1925 (*c.* 84), *ss.* 21, 23, 43 (1) (*b*).

A workman some years before 1928 had suffered from miner's nystagmus. In 1928 he was employed by the appellants and then signed a declaration that he had not suffered from that disease. There was a break in his employment, but, in 1933, when he was re-engaged by the appellants, he again signed a declaration that he had not suffered from the disease. On Nov. 19, 1938, he obtained from the certifying surgeon a certificate that he was suffering from miner's nystagmus. The employers required him to be examined by their own surgeon and his report disclosed an admission by the workman that he had previously suffered from the disease. Thereafter the employers paid him compensation upon the footing of total incapacity. Later they ceased paying compensation and gave as their reason that the workman had made the false declaration above referred to :—

HELD : the facts proved a binding unrecorded agreement to pay compensation, which had in law the same effect as an award. The Workmen's Compensation Act, 1925, s. 43 (1) (*b*), did not disqualify the workman from receiving compensation in such circumstances.

[**EDITORIAL NOTE.** In the course of their opinions in *Scott* v. *Summerlee Iron Co.* (6), VISCOUNT HAILSHAM and LORD THANKERTON appeared to suggest that modification (*b*) in the Workmen's Compensation Act, 1925, *s.* 43 (1) disqualified a workman, who had made a false statement as to his having suffered from an industrial disease, from receiving compensation. This view was rejected by the Court of Session in *Jamieson* v. *St. Flanan Coal Co.* (7) and the Court of Appeal in England have here taken the same view. The modification does not operate as an absolute disqualification, but affords the employer a defence in certain circumstances. The judgments also discuss at length the nature and effect of both unrecorded and recorded agreements under the Act.

AS TO FALSE REPRESENTATION BY WORKMEN, see HALSBURY, Hailsham Edn., Vol. 34, pp. 382, 383, para. 1339 ; and FOR CASES, see DIGEST, Vol. 34, p. 469, Nos. 3836, 3837. See also WILLIS'S WORKMEN'S COMPENSATION, 33rd Edn., pp. 614-618.]

Cases referred to :

(1) *Fraser* v. *Driscoll* (1916), 9 B.W.C.C. 264 ; 34 Digest 387, *3136*.

(2) *Dutton* v. *Sneyd Bycars Co., Ltd.*, [1920] 1 K.B. 414 ; 34 Digest 387, *3140* ; 89 L.J.K.B. 85 ; 122 L.T. 333 ; 12 B.W.C.C. 345.

(3) *Williams* v. *Guest, Keen & Nettlefolds, Ltd.* (1925), 133 L.T. 111 ; 34 Digest 453, *3718* ; 18 B.W.C.C. 68.

(4) *St. Helens Colliery Co., Ltd.* v. *Hewitson* [1924] A.C. 59 ; 34 Digest 280, *2364* ; 93 L.J.K.B. 177 ; 130 L.T. 291 ; 16 B.W.C.C. 230.

(5) *Russell* v. *Rudd*, [1923] A.C. 309 ; 34 Digest 440, *3588* ; 92 L.J.K.B. 429 ; 129 L.T. 193 ; 16 B.W.C.C. 358.

(6) *Scott* v. *Summerlee Iron Co.*, [1931] A.C. 37 ; Digest Supp. ; 99 L.J.P.C. 170 ; 143 L.T. 726 ; 23 B.W.C.C. 312.

(7) *Jamieson* v. *St. Flanan Coal Co., Ltd.*, [1935] S.C. 138 ; Digest Supp. ; 27 B.W.C.C. Supp. 187.

(8) *Rees* v. *Imperial Navigation Coal Co., Ltd.* (1927), 20 B.W.C.C. 287; Digest Supp.

(9) *Goodsell* v. *Lloyds* (*Owners*), [1914] 3 K.B. 1001; 34 Digest 444, *3636*; 834 L.J.K.B. 1733; 111 L.T. 784; 7 B.W.C.C. 631.

Appeal by the employers from an award of His Honour Judge Kingsley Griffith sitting at the Thorne County Court, dated Nov. 21, 1940. The facts are fully set out in the judgment of Scott, L.J.

G. R. Blanco White, K.C., and *W. H. Duckworth* for the appellants.

Gilbert Paull, K.C., and *R. M. H. Everett* for the respondent.

Blanco White, K.C.: There is no evidence of any agreement by the employers to accept liability with knowledge of the misrepresentation. There was no consideration for such an agreement. On the true construction of sect. 43 (1) (*b*) it is a condition of the workman's right that he shall not have made any misrepresentation. The false statement goes to the jurisdiction of the court. [Counsel referred to *Jamieson* v. *St. Flanan Coal Co., Ltd.* (7), *Scott* v. *Summerlee Iron Co.* (6).]

Paull, K.C.: There was ample evidence upon which the arbitrator could have come to the conclusion that there was an agreement to accept liability. An agreement and an award have exactly the same force: sects. 21, 23 of the 1925 Act. An agreement is a complete determination of the matter in dispute, if it is genuine. There is nothing to prevent an employer from dispensing with a condition. [Counsel referred to *Rees* v. *Imperial Navigation Coal Co., Ltd.* (8) and *Goodsell* v. *Lloyds* (*Owners*) (9).] There is good consideration for the agreement in every case where a man gives up his right to ask the court for an award.

Scott, L.J.: This is an appeal by the employers from an award whereby they were ordered to pay the workman £1 10s. per week (plus supplementary allowances, upon which no question arises in this appeal) as compensation for the industrial disease of miner's nystagmus, as provided by the Workmen's Compensation Act, 1925, s. 43, the weekly payment to commence as from June 8, 1940. The date when disablement commenced was certified by the certifying surgeon as Nov. 19, 1938. The employers paid from then until June 8, 1940, when they stopped payment. On June 10, 1940, the mutual indemnity company in which the employers were insured wrote to the workman informing him that no further payments were being made, because

> . . . when being engaged you signed a declaration that you had never previously suffered from nystagmus, whereas we find that you drew compensation for the disease at Helmsworth Colliery for over 3 years.

The declaration referred to was dated Sept. 18, 1933, when the workman had last entered into the employers' employment. Sect. 43 (1) (*b*) provides as follows:

> If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable.

On Sept. 19, 1940, the workman requested arbitration as to the employers' liability to pay and as to the amount and duration. He claimed 30*s.* per week, and added in paras. 12 and 13 of his particulars: "disease and disablement admitted and compensation paid." The employers denied liability (i) on the ground of his "wilful and false representation," and (ii) on the ground that the payments referred to him by them were made "without and before having knowledge of his having previously suffered from nystagmus." At the trial, it appeared that the workman had first been employed by the appellants on Sept. 26, 1928, and had then signed a declaration that he had never had nystagmus in terms precisely similar to those of the declaration signed in 1933, when he was re-engaged, both declarations being contained in the employers' regular books in which their records of the men employed were kept. The workman himself gave evidence, and admitted, mostly under cross-examination, that he had had nystagmus at various times, with periods of incapacity therefrom lasting over 7 years, and that he had been medically certified five times as suffering from the disease. He sought to prove that he signed the declarations of 1928 and 1933 addressed to the present appellants without knowledge that the document contained a declaration by him that he had never suffered from nystagmus. The county court judge disbelieved him, and found definitely against him on the issue of sect. 43 (1) (*b*) of the Act. For that finding of fact there was ample evidence.

At the arbitration, the main dispute was on the above issue of fact under subsect. (1) (*b*). The evidence on both sides was addressed exclusively to that question, but the workman's counsel in the alternative made two replies by way of confession and avoidance of the employers' plea of sect. 43 (1) (*b*). The first was based first on estoppel, and the second, in the further alternative, was based on agreement. I suppose that the county court judge regarded both sufficiently covered by paras. 12 and 13 of the workman's particulars. On the issue of estoppel there was no evidence before the court of any representation of fact made to the workman by the employers, nor of any action thereon taken by the workman to his prejudice, and I agree generally with the county court judge's view that in law, on the facts before him, there could not be any estoppel whatever. In particular, I indorse his criticism of the first sentence of the passage headed "Estoppel" in Willis's Workmen's Compensation, 33rd Edn., p. 657:

> An unequivocal admission of liability binds the party making it although it is not acted upon by the other side . . .

The sentence purports to state the effect of the decision in *Fraser* v. *Driscoll* (1), a case inadequately reported, in which there is no record of real discussion upon the doctrine of estoppel. That case was also adversely criticised in *Dutton* v. *Sneyd Bycars Co., Ltd.* (2) by Warrington, L.J., at p. 418. The common law doctrine of estoppel *in pais* has nothing whatever to do with "admissions of liability," whether unequivocal or not. On such facts as appeared in the present case, the use of the term is wholly misconceived. When counsel for the respondent was expounding his argument upon the effect of agreement as opposed to estoppel under the Act, he told us that he had searched the reports, and, so far as he could find, although there were many decisions upholding an agreement under the Workmen's Compensation Act, 1925, there was not one where a workman had succeeded upon the basis of estoppel. He may well be right, as it is not easy to imagine a representation which would estop either party to a dispute under the Act from proving the true facts. However, as the county court judge said, the argument open to the appellant based on agreement is different, and very much stronger.

In my opinion, in the present case, there was a statutory agreement which justified the decision of the county court judge, and now entitles the respondent to have the appeal dismissed. However, the nature, scope and consequences of such an agreement are matters of general importance, and it may be useful to consider the principles involved before referring to authorities. The policy of Parliament as expressed in the Workmen's Compensation Acts has throughout been to make the machinery for operating them as simple as possible, so that employers and workmen might adjust their differences between themselves without calling in the lawyers. Possibly the novelty of the legislation made achievement difficult, but, if Parliament in 1897, when the first bill was before it, had with prophetic eye foreseen the 34 volumes of Butterworths' Workmen's Compensation Cases which lie within reach of each of us on this Bench whenever we are taking that list, I doubt whether any lawyer today can picture the horror with which either House would then have regarded that prospect. The feature of the Acts which above all others shows how Parliament hoped to save industry from the technicalities of legal procedure with its inevitable expense is the very method of "agreement" upon which this appeal turns. Sect. 21 of the present Act (which was sect. 1 (3) of the 1906 Act) enables the parties to settle by agreement any question arising between them out of the provisions of the Act. Naturally enough, the section also provides for settlement by compulsion of law, but, even so, it calls it "arbitration," apparently with the intention of providing something less formal than ordinary legal procedure, and gives to two types of lay tribunal jurisdiction to make an "award." The heading of the *fasciculus* of sections dealing with procedure (of which sect. 21 is the first) is: "Procedure for determining compensation and settling questions." Sect. 21 (1) provides as follows:

> If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act . . . the question, if not settled by agreement, shall, subject to the provisions of this Act, be settled by the arbitration of a representative committee, or of an arbitrator, or of a judge of county courts in accordance with the first schedule to this Act.

The most significant feature of the section is the implication, which appears to me plainly indicated by its language, that, for the purpose of settling disputes, an "agreement" is to be just as efficacious as a lay award. This equivalence of agreement and award in truth is of the essence of the enactment, and that principle is given its natural extension or application in sect. 23 (1), which provides as follows:

> (1) Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by A a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the committee or arbitrator, or by any party interested, to the registrar of the county court, who shall, subject to such rules and subject to the provisions hereinafter contained, on being satisfied as to its genuineness, record such memorandum in a special register, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment.

B Under sect. 21, there is no difference between (i) an agreement between the parties, (ii) an award of a committee or arbitrator, and (iii) an award of a county court judge. They are there all treated as on the same footing. Nor is there any difference under sect. 23 between a lay award and an agreement, but there is between those two kinds of lay or non- C judicial "settlement," on the one hand, and an actual county court judge's award, on the other, with regard to judicial execution. Yet the section enacts a simple device for removing the difference—namely, recording and registering the award or agreement in the county court—thus completing the full recognition of equivalence between agreement D and award.

It was doubted at one time whether an unrecorded agreement was within sect. 21, or could have the same effect as a recorded agreement, but this doubt was removed by the decision of the Court of Appeal in *Williams* v. *Guest, Keen & Nettlefolds, Ltd.* (3), *per* SARGANT, L.J., at E p. 116. The insertion in sect. 25 of an express condition of the validity of certain agreements that they shall be recorded would seem to put the position of other agreements beyond all doubt. If, then, an unrecorded agreement is just as effective as an unrecorded award of a lay arbitrator, it must have the same consequences as the latter. It must be binding F on the parties. It must settle finally all questions which were, or could have been, grounds of objection in the dispute, and thus fell within the subject-matter of the agreement, and it must thereafter preclude each party from raising anew any question which would have been relevant at the time when the agreement was negotiated, although it was not then G raised. In this respect, its effect is analogous to that of the estoppel by record which is brought about by a judgment, and, *per contra*, is wholly different in character from the effect of an estoppel *in pais*.

What I have said above, however, leaves open the main question argued for the employers before us, which came before us in the following H form. *Ex hypothesi*, when the workman asked for compensation, he had already, by reason of sect. 43 (1) (*b*), lost his right to compensation, and there was then nothing to prevent the appellants from meeting his request with a blank refusal. Instead, they paid, and continued to pay for 18 months. The legal contention of counsel for the appellants was that the effect of modification (*b*) was (i) to put the workman outside the Act, and, therefore, (ii) to deprive any arbitrator, whether judicial or non-judicial, of all statutory jurisdiction under the Act, and he contended that, for the same reason, it was not within the competence of the parties to make a statutory agreement for the payment and receipt of compensation. He relied on *Dutton* v. *Sneyd Bycars Co., Ltd.* (2), where a workman had suffered from an industrial disease which was not within sect. 8 (1) of the Act of 1906, now sect. 43 of the Act of 1925, at all. The employers had paid him compensation for a time and had purported to do so under the Act. After a while, however, they took the objection that the disease was outside the Act, and stopped payment. The workman replied by alleging that they were estopped by conduct from disputing liability under the Act, and the county court judge so held. The Court of Appeal, however, reversed that decision, on the ground that there was no estoppel. The only point decided was that there was no estoppel, but WARRINGTON, L.J., at p. 419 also expressed views on the subject of agreements, first that there was in that case no agreement in fact, and secondly [p. 420]:

> . . . that parties cannot by any form of estoppel or by agreement so enlarge the operations of the Act as to bring within it " other cases " or to extend the limited statutory jurisdiction to those cases.

In the same case, ATKIN, L.J., said, at p. 421:

> Employer and workman cannot by agreement give one another rights under the Act which are not given by the Act; nor can they give to the county court judge jurisdiction to determine under the Act disputes which are not under the Act. . . . It is entirely different where the parties determine by agreement questions that arise within the Act, *e.g.*, whether a person injured is a workman to whom the Act applies; whether he was injured by accident, whether the accident arose out of, or in the course of, his employment, what the amount of the compensation should be. In such cases the agreement of the parties operates within the ambit of the Act.

In the latter passage, I think that ATKIN, L.J., was accepting as the proper criterion for deciding whether or not an agreement is under the Act the test which I regard as the right one—namely, was the issue which was covered by, or involved in, the agreement a question which, if disputed in an arbitration, the arbitrator would, under his statutory reference, have had jurisdiction to decide? In such case, the agreement is not outside the Act, and the issue in question is disposed of by the agreement for good and all. There is nothing in the decision in *Dutton's* case (2) which interferes with our judicial freedom in the present case. The view which I have just expressed was, indeed, expressed in this court in *Williams* v. *Guest, Keen & Nettlefolds, Ltd.* (3). The accident to the workman there fell outside the Act on another ground—namely, that it was not in the course of his employment as defined by the House of Lords in *St. Helens Colliery Co., Ltd.* v. *Hewitson* (4)—but the workman and his employers had made an agreement for payment to him of compensation, and the Court of Appeal, affirming the county court judge, held that the agreement bound the employers, because the issue of whether or not the accident arose in the course of employment was an issue which an arbitrator under the Act would have had jurisdiction to decide. In *Russell* v. *Rudd* (5), the House of Lords held, as was pointed out by

SCRUTTON, L.J., in *Williams* v. *Guest Keen & Nettlefolds, Ltd.* (3) at p. 77:

> . . . you cannot make agreements which give the workman more or less than the benefit he is entitled to under the Act, because that is contrary to sect. 1 (3) of the Act of 1906 [now sect. 21 (1) of the Act of 1925] and is contracting out of the Act.

However, in *Williams'* case (3), the court held that the unrecorded A agreement there made was binding on the employers. The next case chronologically which was cited to us for the employers was *Scott* v. *Summerlee Iron Co.* (6), a Scottish case in which the House of Lords dismissed an appeal by the workman from the Second Division. That case, like the present, turned on whether a false and wilful representation B that he had not suffered from nystagmus had been made by the workman to the employer on entering his employment within modification (*b*).

The appeal turned on the simple question whether the workman had made the representation to the employer "at the time of entering the employment" so as to bring modification (*b*) into operation and bar the C workman's right to payment. One date when he had undoubtedly entered "the employment" to the nature of which the disease was due was Apr., 1927, but he had made no such representation then. The sheriff-substitute held that his employment by the employer from whom compensation was claimed, had been continuous from that date until D Sept., 1928, the date of his disablement by the disease, and that two subsequent misrepresentations at dates within the previous twelve months, when, after temporary unemployment, he had re-entered the employment, were irrelevant, because there had been no break in the employment at those times. He accordingly held the workman entitled E to compensation. The Court of Session reversed the decision, holding in effect that there was no evidence before the sheriff-substitute of such continuity. The House of Lords dismissed the appeal, holding that there had been on each of the two periods of unemployment a break in the employment, so that each of the two later misrepresentations were made F at the time "when the workman entered the employment," with the result that the workman's right to compensation was barred by modification (*b*). The decision itself is thus irrelevant to the present appeal, but in the course of their opinions, VISCOUNT HAILSHAM and LORD THANKERTON made important general observations about the meaning G of modification (*b*), which might affect the scope of an agreement under the Act, and on these counsel for the appellants fastened as the basis of his main argument, although he conceded that they were *obiter*, and not actually binding on us. VISCOUNT HAILSHAM said, at p. 44:

> Further it is to be noted that the statute does not purport to afford a defence H against the workman's claim to an employer who has been misled by the mis-statement; it renders the mis-statement a disqualification of the workman from the right to receive compensation.

Then LORD THANKERTON said, at p. 51:

> Further, proviso (*b*) is a condition of the right to compensation, and the last employer is not mentioned except in the provisos which deal with the method of recovery of the compensation.

In my opinion, the use to which counsel for the appellants sought to

put these two general pronouncements was not justified by the context in which they were uttered. Their Lordships' minds were not on the question now before us. In particular, they were not considering whether or not the legislature had given an arbitrator power to adjudicate on the issue raised by modification (*b*), and it is primarily because I think that A
that paragraph must be so construed that I hold that the agreement in the present case necessarily precluded the appellant employers before us from repudiating their liability and stopping payment. However, there is Scottish authority subsequent to *Scott* v. *Summerlee Iron Co.* (6) which is directly in point, and that is *Jamieson* v. *St. Flanan Coal Co., Ltd.* (7). B
In Aug., 1931, a miner signed a declaration under sect. 43 (1) (*b*) on entering the employment of B. He had in fact suffered from nystagmus when employed by A in 1923. In May, 1932, he entered the employment of C, but, as he told the manager that he had had nystagmus, he was not asked to sign a declaration. In Aug., he was again disabled C
by nystagmus when still employed by C. Proceedings for compensation were started by him and settled by an agreement. The sheriff-substitute held that the misrepresentation in Aug., 1931, was not wilful, and that he was entitled to compensation in accordance with the agreement. Two questions of law had been left to the court by the sheriff-substitute D
(in an illogical order). The first was as to the effect in law of the agreement in regard to the issue under sect. 43 (1) (*b*), and the second was whether or not the representation was wilful. The First Division of the Court of Session held unanimously that the written misrepresentation was wilful, but, by a majority (Lord Blackburn dissenting), that the agree- E
ment of Sept., 1932, precluded the employer from disputing liability. The two *dicta* in *Scott's* case (6), which I have quoted, were considered. The decision is not binding on this court, but the judgments are entitled to great respect, and that of Lord President Clyde, in which he reviewed the legislation and the authorities, is of special value in the present F
appeal. I concur in the whole of his judgment, subject, however, to one small modification. The question of the scope within which an agreement under the Act binds the parties in a case where sect. 43 (1) (*b*) could, before agreement, have enabled the employer to disclaim liability does not necessarily depend on whether the provision is, on the one hand, a condi- G
tion of the workman's right to compensation, or, on the other, a mere defence which the employer may raise if he chooses. It depends primarily on whether the Act gives an arbitrator jurisdiction to decide the issue of fact. In my opinion, it does. My reasons are as follows. (1) What an award can do, an agreement can do. What an arbitrator can, at the H
instance of one party, do against the will of the opposing party, the two parties can do by agreement between themselves. (2) If the respondent to a claim in an arbitration has a possible answer, which, if he so chooses, he can raise, but does not raise it and allows the award to go against him, he cannot, as a general rule, re-open the award, or thereafter disclaim a liability established by the award. (3) To that general rule there

is one exception. The omission of a respondent to take an objection to the statutory jurisdiction of the arbitrator which he can take if he chooses cannot enlarge the arbitrator's jurisdiction under the Act or enable him to make an order outside its limits, unless the Act has given him power to A adjudicate on the particular issue of his own jurisdiction which is raised by the dispute before him. In that case, if he decides it one way, he can hear and decide the dispute. If he decides it the other way, he must decline jurisdiction. (4) In my opinion, sect. 43 (1) (*b*) is an enactment of the exceptional kind, giving the arbitrator power to decide whether B or not the workman made the representation. Its opening words, " If it is proved," of themselves import that interpretation. " Proved " before whom ? Obviously, the arbitrator. Sect. 1 (1) (*b*), the serious and wilful misconduct enactment, is in the same words : " If it is proved." There the contention that the arbitrator has no jurisdiction would be C unarguable. Proviso (i) to sect. 9 (4), as introduced into the Act of 1925 by the Act of 1931, is similar :

> . . . no order shall be made under this subsection if it appears to the judge that the workman has not taken all reasonable steps to obtain employment.

The fact that " the judge " is expressly mentioned cannot, in my opinion, D prevent the implication, where he is not mentioned, that it is to his satisfaction that there shall be proof. It is worth noticing that the Workmen's Compensation Rules, 1926, r. 43, and Form 36 (ii) assume and illustrate what I have called the principle of " statutory equivalence " between an award and an agreement under the Act.

E Finally, it may be well to point out that the wrong statutory procedure was adopted by both sides in the present case. The workman would have been well advised to record his unwritten agreement. The employers had no right under sect. 12 to stop payment. They should have applied to review. Had the workman tendered a memorandum of his F agreement under sect. 23, the employers could as a matter of procedure have raised their present contentions. In either case, the result would have been the same, but the procedure of the Act is in principle simple, and it would be better for both sides—and for the courts—if it were followed.

G Since writing this judgment, I have had the opportunity of reading that of my brethren. I agree with their conclusions, and also with what they say on certain matters which I have not mentioned.

The appeal must be dismissed with costs.

H GODDARD, L.J. : The judgment I am about to read has been read by CLAUSON, L.J., who authorises me to say that he agrees with it and adopts it.

The facts found by the arbitrator can, for the purpose of this appeal, be stated quite shortly. The workman entered the service of the employers on Sept. 26, 1928. On entering the employment, he represented in writing that he had not previously suffered from nystagmus. This representation was false, and is found by the arbitrator to have been made wilfully. During his service with the employers, the workman again contracted nystagmus, and on Nov. 19, 1938, he obtained from the certifying surgeon the certificate necessary to entitle him to compensation. The employers required him to be examined by a surgeon on their behalf, and on this examination the workman disclosed that he had previously suffered from the disease. That he did not make a full disclosure as to the number of times he had previously been disabled from this cause is the fact, but it is immaterial. The surgeon reported to the employers in writing that it was a severe case, and recorded in his report the workman's admission that he had previously suffered from this complaint. Thereafter the employers, without further question, paid to the workman, who was and is wholly incapacitated, compensation at the full rate until June 8, 1940, when they ceased payment. They gave as their reason that the workman was disentitled to it because of the false statement he had made on entering their service. Thereupon, the workman took the present proceedings claiming compensation. No explanation was offered by the employers at the hearing as to why they paid compensation after receiving the doctor's report that the man had previously suffered from the disease. The arbitrator has found that they made the payments with knowledge of the fact that the representation was false, and he bases his finding on the fact that the employers always had in their possession the means of knowledge to this effect, and so he attributes actual knowledge to them. Were I of the opinion that it was necessary for the workman to prove that, when the employers made the payments, they were conscious of his deceit, I should hesitate long before I held that, because they had means of knowledge in their possession, this was enough to show that they had actual knowledge, but, as will appear later, I do not think that it was incumbent on him to prove this, and, therefore, I say no more about it. The arbitrator then went on to hold that the payment and receipt of compensation constituted a binding and concluded agreement whereby all questions of liability between the parties were settled, subject only to the provisions for reviewing the payments as provided by sects. 11 and 12 of the Act. Accordingly, he awarded in favour of the workman.

For the appellants, three main contentions were advanced—namely, (i) that there was no evidence on which an agreement could be found; (ii) that there was no consideration for any agreement; and (iii) that sect. 43 (1) (*b*) imposed a disqualification on the workman from receiving compensation, and that, therefore, there was no jurisdiction to award it. It is clear that the Act contemplates that questions as to whether or not a workman is entitled to compensation are to be settled either by agreement or by arbitration. If the parties agree, there is no need to proceed to arbitration, and an agreement is as binding as an award. Machinery exists for the recording of agreements, which then have the effect of a county court judgment, and execution can be issued thereon. However, cases binding on this court have decided that, so far as settlement of questions relating to the right to compensation is concerned, an unrecorded agreement has the same effect as one which has been recorded, and the appellants did not contend to the contrary. It is said here, however, that the mere fact of payment is no evidence of agreement. With this contention I cannot agree. When a workman claims compensation, and, in the case of an industrial disease, produces the necessary certificate, and when the employer, without stating that he does so without prejudice, or pending further inquiry, or the like, thereupon pays, and continues to pay, the full amount for which the Act provides, and offers no evidence as to why he makes these payments, the only inference which can be drawn, as it seems to me, is that the payment involves a recognition of liability and an implication that the employer agrees that the workman is entitled to it. If authority be needed, it will be found in *Williams* v. *Guest, Keen & Nettlefolds, Ltd* (3) and *Rees* v. *Imperial Navigation Coal Co., Ltd.* (8). The consideration for the agreement is, of course, the fact that the workman abstains from taking proceedings to obtain an award, and that must be true of every agreement made for the purpose of the Act. It would, indeed, be a strange state of affairs if, when an Act of Parliament has expressly stated that agreement should be one of the methods for settling questions, it were open to either party to say that, although there was an agreement, there was no consideration to support it.

Apart from whether modification (*b*), of sect. 43 (1) amounts to such a disqualification that the court has no jurisdiction to award in favour of the workman, the question arises whether the employers can now say that the agreement is vitiated by reason of the workman's mis-statement on entering their service. In my opinion, they cannot. The agreement to pay compensation was not induced by any fraudulent representation. The workman said no more than: "Here is the certifying surgeon's certificate that I have contracted a disease while in your employment. Please pay me compensation." An answer was available to the employers if they had chosen to avail themselves of it, but they did not, and, incidentally, they have given no explanation of why they did not. As already pointed out, an agreement has the same effect as an award, and, if the workman had taken proceedings to obtain an award and the employers had not set up the misrepresentation as a defence, they could not afterwards have relied upon it, except as a ground for applying for a rehearing by reason of the discovery of further evidence. They would then have had to show that the further evidence was such as could not have been discovered before by the application of reasonable diligence, and obviously they could not have shown that in the present case. If, then, they could not upset an award on this ground, neither can they upset an agreement. This was the opinion of the Court of Session in *Jamieson* v. *St. Flanan Coal Co., Ltd.* (7), and I entirely agree with it. It is said, however, that passages in the opinions of VISCOUNT HAILSHAM and

LORD THANKERTON in *Scott* v. *Summerlee Iron Co.* (6) oblige us to hold that modification (*b*) imposes an absolute disqualification on a workman who has made a wilful misrepresentation on entering the employment. It is true that in that case both VISCOUNT HAILSHAM and LORD THANKERTON did say that the provisions of the modification did not afford a defence A but imposed a disqualification, but their remarks on this matter were, with all respect, *obiter*. The question before the House in that case had nothing to do with that which now falls for decision. It was as to the effect of a false representation made, not to the employer against whom the workman had taken proceedings, but to another in whose B service he had previously been. On this point, I take the same view as did the majority in the Court of Session in *Jamieson's* case (7). It appears to me that the opening words of the paragraph in question, "If it is proved," clearly contemplate the misrepresentation being set up as an answer to the claim, and that for this purpose there is no difference C between this paragraph and sect. 1 (1) (*b*), which makes serious and wilful misconduct a ground for disallowing compensation, and which, so far as I am aware, has always been regarded as a matter of defence. As CLAUSON, L.J., pointed out during the argument, if this paragraph went to jurisdiction, it would be open to the employers to obtain a prohibition. D If that remedy were sought, the answer surely would be that the false representation must be proved in the arbitration proceedings. It does not appear on the face of the proceedings. It is a matter which is, or may be, in issue, and which, if proved, will afford an answer.

One other matter calls for attention. As was pointed out by SCRUTTON, E L.J., in *Williams* v. *Guest, Keen & Nettlefolds, Ltd.* (3), where employers have ceased to make payments under an unrecorded agreement to a man who is still incapacitated, the proper remedy is for the workman to apply to record the agreement, and not to start proceedings *de novo*. The employer can then take any objection which the Act allows to the F recording of the agreement. The fact that this course was not adopted in the present case ought not, however, to affect the result, for two reasons—namely, (i) no such point was taken at the arbitration, and (ii) the employers would not have been entitled to set up the misrepresentation in answer to the application. It did not affect the genuineness of G the agreement, and, for the reasons already given above, they could not have asked to have the agreement set aside for misrepresentation. In my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

H

Solicitors: *Johnson, Weatherall, Sturt & Hardy*, agents for *Parker, Rhodes, Cockburn & Co.*, Rotherham (for the appellants); *Corbin, Greener & Cook*, agents for *Raley & Sons*, Barnsley (for the respondents).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

pplied. HOLLING v. YORKSHIRE
RACTION CO., LTD. [1948] 2 All
.R. 662.

DOLLMAN AND ANOTHER v. A. & S. HILLMAN, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., MacKinnon and du Parcq, L.JJ.), **February 27, 1941.**]

A *Nuisance—Premises adjoining highway—Danger arising from ordinary user—Butchers' shop—Piece of fat escaping on to pavement.*

The respondent fell and was injured by slipping on a piece of fat outside a butchers' shop owned by the appellants. It was found as a fact at the trial that the fat came from the shop and that it either flew from the shop when meat was being cut up on a stand near the door, or was carried out adhering to the shoe of a customer :—

B HELD : (i) in the circumstances, the presence of the fat upon the pavement constituted a nuisance for the cause of which the appellants were responsible.

(ii) the facts led to the conclusion that the appellants had been negligent.

C [**EDITORIAL NOTE.** In this case, the owners of the shop have been held both to have been negligent and to have caused a nuisance. So far as the case is based on negligence, the matter seems to be purely a question of fact. The questions arising from the allegation of nuisance are more difficult. Liability for nuisance has been considered in a number of cases recently. It is to be noticed that the premises here abutted on to the highway, and that the danger complained of was on the highway itself. In the circumstances, it was held in the court below that the shop-
D keeper would be liable for a nuisance (*a*) if he caused it, (*b*) if by neglect of some duty he allowed it to arise, or (*c*) if, after it has arisen, he neglects to remedy it within a reasonable time. The judge in the court of first instance treated the case as one of the continuance of a nuisance after its existence had become known, or ought to have become known, to the shopkeeper ; but the Court of Appeal have taken the view that, as the shopkeeper caused the danger, no question of
E the continuance of a nuisance could arise. The case is of considerable importance to those owning premises adjoining the highway, and they must take precautions that nothing likely to become a danger to the public using the highway is allowed to escape from their premises.

AS TO NUISANCE FROM USER OF PROPERTY, see HALSBURY, Hailsham Edn., Vol. 24, p. 49, para. 85 ; and FOR CASES, see DIGEST, Vol. 36, p. 186, Nos. 295-300.]

F Cases referred to :

(1) *Sedleigh-Denfield* v. *O'Callagan* (*St. Joseph's Society for Foreign Missions Trustees*), [1940] A.C. 880 ; [1940] 3 All E.R. 349 ; Digest Supp. ; *revsg.* S.C. *sub nom. Sedleigh-Denfield* v. *St. Joseph's Society for Foreign Missions*, [1939] 1 All E.R. 725.

G (2) *Byrne* v. *Boadle* (1863), 2 H. & C. 722 ; 36 Digest 51, *315* ; 33 L.J.Ex. 13 ; 9 L.T. 450.

(3) *Pope* v. *Fraser and Southern Rolling & Wire Mills, Ltd.* (1938), 55 T.L.R. 324 ; Digest Supp.

(4) *Noble* v. *Harrison*, [1926] 2 K.B. 332 ; 36 Digest 189, *316* ; 95 L.J.K.B. 813 ; 135 L.T. 325.

(5) *Lyons, Sons & Co.* v. *Gulliver*, [1914] 1 Ch. 631 ; 26 Digest 428, *1475* ; 83
H L.J.Ch. 281 ; 110 L.T. 284.

(6) *Castle* v. *St. Augustine's-Links, Ltd.* (1922), 38 T.L.R. 615 ; 36 Digest 186, *300.*

APPEAL by the defendants from a judgment of ASQUITH, J., dated Nov. 14, 1940.

At about 4.50 p.m. on Oct. 8, 1938, the female plaintiff was walking along the pavement in front of the defendants' shop when she slipped on a piece of fat and sustained injuries to her left thigh and her left leg. The judge found as a fact that the fall was due to the presence of a piece of fat on the pavement, and that that piece of fat came from the defendants' shop. The evidence showed that the shop was fitted with a glass shopfront, and, therefore, so far as meat was trimmed in the shop, it was unlikely to reach the pavement otherwise than by adhering to the shoe of a customer. There was, however, evidence that meat was sometimes cut on a stand or table which was practically in the doorway of the shop. From this stand or table fragments might fall through the door. There was no evidence to establish how the piece of fat in this case reached the pavement.

Asquith, J., held that it was unnecessary to decide whether the defendants were negligent as he had come to the conclusion that they were liable in nuisance. Their employee had seen the female plaintiff coming along the pavement and witnessed her fall. He ought to have become aware of the presence of the piece of fat before she reached it, and should have taken steps to remedy it. As he did not do so, the defendants were liable for continuing a nuisance, unless they could show contributory negligence on the part of the female plaintiff. This they had failed to do. To say that the employee of the defendants should have been aware of the presence of this piece of fat was one thing, as he was aware of the possibility of pieces of fat reaching the pavement and of the danger thereby involved. It was quite another thing to say that the female plaintiff should have seen it on a wet afternoon in October, when the light was probably not too good. The judge gave judgment for the plaintiffs for £469 2*s.* and costs.

Gilbert Paull, K.C., and *D. A. Scott Cairns* for the appellants.

A. T. Denning, K. C., and *B. Stuart Horner* for the respondents.

Paull, K.C.: Unless it be proved that the appellants caused the fat to be upon the pavement, there can be no duty on them in the matter. After the highway authority has taken over the responsibility for the road, no liability rests upon the tenants. It was not established that the fat had been upon the pavement for any length of time. It is clear that, on the facts of this case, there can be no liability upon the appellants. There was no evidence of any negligence on their part, and no evidence of any duty owing by them.

Denning, K.C.: Nuisance is the correct finding. The findings of the judge import the causing of a nuisance rather than the continuing of a nuisance. The findings also import negligence. The defendants ought to have foreseen the possibility of pieces of fat getting on to the pavement. They did, in fact, foresee it, but they took inadequate steps to guard against the danger. There is no suggestion of any way in which the piece of fat might have reached the pavement other than those in the findings of the judge. The piece of fat was a public nuisance in that the exercise of a public right of passage was rendered dangerous. If any person suffered special damage in consequence, that person had a right of action against the one who caused, or who continued, the nuisance. A deliberate act of causation is not essential, but a degree of personal responsibility is required. That is the degree of personal responsibility which rests upon the defendants. A reasonable possibility is sufficient: *Sedleigh-Denfield* v. *O'Callagan* (1). If a man so manages his property that he injures another, he is liable for the consequences. On the question of negligence, the judge took a view unduly lenient to the defendants. The doctrine of *res ipsa loquitur* must not be pushed too far. In the present case, the defendants should prove how the accident happened. An inference, similar to that drawn in *Byrne* v. *Boadle* (2), should be drawn in the present case. [Counsel referred to *Pope* v. *Fraser and Southern Rolling & Wire Mills, Ltd.* (3), *Noble* v. *Harrison* (4), *Lyons, Sons & Co.* v. *Gulliver* (5) and *Castle* v. *St. Augustine's Links, Ltd.* (6).]

Paull, K.C., in reply: There is no evidence that the piece of fat flew off the stand on to the pavement. There is no evidence that any cutting up was done at the stand on the day on which the accident happened. The evidence does not show more than a possibility. The inference must not be drawn that the proprietors of a butcher's shop are liable for damage caused by any piece of fat found outside that shop. There is no satisfactory evidence to show how the fat came to be upon the pavement. The pavement was swept regularly. There is no duty upon a butcher to keep somebody constantly on the watch to see whether or not a piece of fat is upon the pavement. It cannot be inferred, from the mere fact that meat was cut up at a particular spot occasionally, that the piece of fat in question came to be where it was at the time the accident happened because it flew off the stand when chopping was being done.

SIR WILFRID GREENE, M.R.: In this case, the judge found as a fact that the first plaintiff fell and was injured by slipping on a piece of fat on the pavement. That finding is not disputed in this court. He also found that the piece of fat in question came from the appellants' shop. That finding was provisionally accepted by counsel for the appellants, although he reserved the right (which he did not exercise) to criticise it in case of necessity. The judge then proceeded to consider whether the piece of fat came to be where it was through the defendants' negligence or in circumstances fixing them with liability for a nuisance. It was not disputed that a piece of fat of such a character as to be dangerous when lying on the public pavement is a public nuisance. Those questions the judge dealt with in this way. As I construe his judgment, he found as a fact that the piece of fat in question came to be upon the pavement in one or other of two ways. That is to say, either it jumped out on to the pavement as the result of a chopping or slicing operation conducted inside the shop or it fell within the shop and was somehow carried to the pavement, on the foot of a customer or otherwise. I think that he means by that that the alternative is one in which the fat fell within the shop and was carried out on to the pavement, on the shoe of a customer, for instance, because he continues as follows:

> If, therefore, the defendants are to be held liable, a liability must be established which would arise in whichever of these ways the fat reached the pavement. In other words, it must be shown that the defendants would be liable even if the object reached the pavement on the shoe of a customer.

Counsel for the appellants challenged that finding. In the first place, he said that there was no evidence that this piece of fat came from the chopping or slicing operation, and that there was no sufficient evidence that any such operation at the relevant point—namely, on the stand near the door—took place on that day. I do not agree with that. It seems to me that the evidence was sufficient to indicate that that operation did take place at that spot on that day. Then he said that there are many other possible ways in which the fat may have found its way from the shop. It may have adhered to a parcel or a basket which a customer put down upon a block or a counter, and he said that it is not justifiable to limit to two the ways in which the fat might have got there. I am afraid that I cannot accept that view. The court has to consider in a question of this kind the probabilities, and only that degree of proof which circumstances permit is to be required. There are all kinds of ways in which a piece of fat might get on to the pavement. Some malicious person might have picked it up from a place where he had no right to go and have thrown it there. In the present case, it is not speculation which leads to the selection of those two alternatives as exhaustive alternatives, but a probability upon which a judicial decision may properly be founded. Those were the suggestions put to the witnesses when they were examined, and there was evidence from them that the piece of fat could have got on to the pavement in one or other of those ways. Those were obviously the most likely ways. It is no part of the duty of a plaintiff in a case of this kind to trace back the history of this identical piece of fat and prove how it got there by some perfectly conclusive chain of evidence. I think that the judge was perfectly entitled, on the evidence before him, to do what he did—namely, to state that one or the other of those alternatives was the way in which the fat found its way to the place where it was. He does not deal with the question of negligence, because he decides the case on the ground that the defendants were liable for a nuisance on the highway. He proceeds on the footing, apparently, that, even if it could not be said that they caused the nuisance either directly or indirectly, nevertheless they must be taken to have continued it, for the reason that they omitted to remedy the nuisance within a reasonable time after they became aware of it, or ought to have become aware of it. With all respect to the judge, I cannot follow and accept his reasoning on that particular point. It appears to me that, unless it could be established that the defendants were responsible

for the piece of fat being where it was, the evidence would not be sufficient to establish the proposition that they ought to have become
aware of its existence before the female plaintiff slipped upon it. The
judge thought that the assistant in the shop ought to have seen it,
A particularly as he was aware of the possibility of pieces of fat reaching
the pavement. I cannot accept that way of looking at the matter,
because, if it be assumed that the fat got on to the pavement without
any responsibility on the part of the defendants, I cannot myself see
how the circumstance that it was allowed to remain there could ever
B be a matter of complaint against the defendants, unless it were established that they knew, or ought to have known, that it was there. I
do not think that the evidence is sufficient to establish that. However,
it does appear to me that the facts which the judge finds are sufficient
to lead to the conclusion—and, indeed, must lead to the conclusion—
C that the defendants were responsible for this nuisance, and that they
caused it, either directly or indirectly. Taking the alternative ways
in which the fat may have got on to the pavement, if it got there
through the slicing operation and by jumping off on to the pavement,
obviously the defendants caused the nuisance directly. They
D put the piece of fat on the pavement just as though they picked it up
and put it there by hand. If, on the other hand, the fat got there
because it adhered to the shoe of a customer, then it seems to me that
they caused it indirectly, because they so conducted their business
that fat was in a position on the floor of their shop where a customer,
E treading upon it, would be likely to pick it up on his or her shoe and
take it out on to the pavement. Such a result was one which, on the
evidence, in my opinion, reasonably ought to have been foreseen. That
being so, if the result happens, it is right to say that the defendants caused
the nuisance. It is not really a question of continuing the nuisance.
F It is a question of causing it. The fact that pieces of fat might reach
the pavement in one way or the other is brought home to the defendants
both by the findings of the judge and by independent examination of
the evidence. The evidence of the manager was particularly striking,
because practically the first thing he thought about doing when he
G saw the accident was to examine the shoes of the female plaintiff to
see if any fat was sticking to them. How he can have thought
fat could have got there except by being picked up from his shop on the
shoe I cannot imagine. However that may be, I am of opinion that the
findings of the judge lead to the conclusion that the defendants are
H liable for causing a nuisance. I also take the view that the same facts
lead to the conclusion that the defendants were guilty of negligence.
Either they negligently allowed the fat to jump into the street from their
slicing operations or they negligently allowed the fat to be in such a
place in their shop that a customer might reasonably be expected to pick
it up on her shoe and take it out into the street. Precisely the same
facts as those relevant on the question of nuisance appear to me to lead

to the conclusion that the defendants were guilty of negligence. In the result, therefore, I agree with the conclusion of the judge, although for different reasons. The appeal must, accordingly, be dismissed with costs.

MACKINNON, L.J. : I agree. I do not think the case raises any difficulty or any question of law. It raises only a question of fact. On the findings of the judge, I agree with his conclusion, although I agree with SIR WILFRID GREENE, M.R., as to the possibility of certain criticism of the way in which he expressed his view. I agree that this appeal fails.

DU PARCQ, L.J. : I also agree, and for the same reason.

Appeal dismissed with costs.

Solicitors : *P. R. Kimber* (for the appellants) ; *Edgar H. Hiscocks* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re POLLOCK, POLLOCK *v*. POLLOCK.

[CHANCERY DIVISION (Farwell, J.), **February 26, 1941.**]

Descent and Distribution—Felonious killing of deceased—Insanity—Onus of proof—Sufficiency of proof.

A husband and wife were both found shot and the evidence established that the husband had shot his wife and then shot himself. There was also evidence that the husband had been in a depressed condition for some months previous to the above events, but beyond that there was no evidence to show the state of his mind at the time. The wife, by her will, had left the whole of her property to her husband :—

HELD : the husband's estate could not benefit under the wife's will, as the onus of proving that the husband was insane at the time was upon those claiming to benefit under that will and this onus they had not discharged. The personal representative of the wife must be given leave to administer her estate on the footing that she had died intestate, but, as she had been killed by the felonious act of the husband, the husband's estate could not benefit under that intestacy.

[**EDITORIAL NOTE.** It has recently been settled that the person who feloniously kills another cannot benefit under the will or the intestacy of the person so killed. There is, of course, an exception in the case where the person committing the felony is of unsound mind at the time of the felony. The present decision is concerned with the onus of proof and the sufficiency of the proof of the unsoundness of mind. It is recalled that the verdict of the jury at the inquest is not a matter which can be taken into consideration, and the question has to be determined upon evidence adduced upon the hearing of the summons.

AS TO FELONIOUS KILLING OF DECEASED, see HALSBURY, Hailsham Edn., Vol. 14, p. 237, para. 407 ; and FOR CASES, see DIGEST, Supp., Descent and Distribution, Nos. 283h, 283j.]

Cases referred to:

(1) *Bird* v. *Keep*, [1918] 2 K.B. 692; 13 Digest 260, *408*; 87 L.J.K.B. 1199; 118 L.T. 633; 11 B.W.C.C. 133.

(2) *M'Naghten's Case* (1843), 10 Cl. Fin. 200; 14 Digest 56, *229*.

(3) *Re Sigsworth, Bedford* v. *Bedford*, [1935] Ch. 89; Digest Supp.; 104 L.J.Ch. 46; 152 L.T. 329.

ADJOURNED SUMMONS to determine whether the residuary estate of Eveline Morton Pollock passed under her will to Hamilton Rivers Pollock, or whether it should be administered as if she had died intestate. The facts are fully set out in the judgment.

Sir Lancelot Elphinstone for the plaintiff.

Hon. C. R. R. Romer, K.C., and *M. Gravenor Hewins* for the first defendant, the infant.

Geoffrey Cross for the second and third defendants, the charities.

FARWELL, J.: This summons asks on behalf of the administrators of Eveline Morton Pollock:

> . . . whether the residuary real and personal estate of the said Eveline Morton Pollock deceased passed under her will to the said Hamilton Rivers Pollock or whether the said Eveline Morton Pollock died intestate as to such residuary real and personal estate.

The question arises in somewhat tragic circumstances. Eveline Morton Pollock was the wife of one Hamilton Rivers Pollock, and by her will, dated July 18, 1924, she gave the whole of her property to her husband. On June 11, 1940, the husband and wife died, and each died as the result of a revolver shot wound. There was no one actually present at the time of the killing, and, therefore, there is no one who can give direct evidence as to what occurred on that day. The evidence of the doctor who had attended both these people during their lifetime and that of the housekeeper, which evidence is admissible in this court for the purpose of these proceedings, does indicate, I think, beyond any reasonable doubt, that the husband shot his wife and then proceeded to commit suicide. The evidence is not absolutely conclusive. There was no one actually in the room at the time, but the evidence of the housekeeper is that she had breakfast with the husband and wife, that the husband at the time was rather quiet but otherwise normal, that the wife was in her usual spirits, that she left the room and went upstairs to attend to some domestic matters, that she heard someone go upstairs and then come down again, and that almost immediately after that she heard two shots. She went down to the morning room and there found the wife sitting dead in a chair, having been shot through the face, and the husband shot through the mouth with the roof of his mouth blown away. I think that no one can have any real doubt that what happened was that the husband killed his wife and then committed suicide, but there is no evidence whatever to indicate how and in what circumstances that killing was done. That is to say, there is nothing to indicate—or to prove, rather—the state of mind of the husband at the time when he killed his wife and then committed suicide.

The evidence of the doctor and of the housekeeper in this regard is, I think, much to the same effect. They both say that the husband was, and had been for some months, in a rather depressed condition. He was worried by the war and by the stress of life in present circumstances, and no doubt he was feeling the strain under which we all are living at the present time, and perhaps showing the effect of the strain rather more openly than some of us do, but beyond that there is no evidence to show the state of his mind at the moment when he and his wife died. There was, of course, an inquest, where the matter was considered by a coroner and jury, and the jury found that the wife died as the result of a revolver shot fired by the husband and that the husband committed suicide. The fact that that was the jury's verdict is no evidence whatever of what happened. The matter has been clearly dealt with by the Court of Appeal in *Bird* v. *Keep* (1). I have to proceed on such evidence as is properly admissible before me in the form of the affidavits which have been filed in this matter. So far as that evidence is concerned, all that has been established satisfactorily, to my mind, is that these two people died on June 11, 1940. The wife died as the result of a revolver shot fired by her husband, and the husband died as the result of a revolver shot fired by himself, and thereby committed suicide. On the evidence before me, that is sufficiently established, and I am prepared to act on the inference which I can properly draw from that evidence. There is no evidence before me of any sort or kind which can enable me to come to any conclusion whatsoever as to the state of mind of the husband at the moment of that fatal incident.

It is plain that, when one person has killed another, the murderer is not entitled to participate in the estate of the person who has been murdered, whether the murderer claims under a will or under an intestacy. There was at one time some doubt on the question of an intestacy, but that, I think, has now been laid at rest, and the conclusion, with which I entirely agree, and which I think is binding on me, is that, whether by a will or by an intestacy, the result is the same. There is the exception that, if the fatal act was done at a time when the person who committed the murder was of unsound mind, then he would not be guilty in the proper sense of the word. In *M‘Naghten's Case* (2) it was decided that, if such a man commits murder, he is entitled to be acquitted. He must now, by statute, be ordered to be detained, but at any rate I think that it is plain, and it was so decided, that he was entitled to be acquitted of murder, and, in those circumstances, the person who commits a murder when he is insane is not prevented from taking benefit under the will or the intestacy of the person murdered.

It follows that, it having been decided that that is the law, it is a matter of relevant importance in a case of this kind to appreciate the position of the administrator who has to administer the estate of the murdered person, because he wants to know whether he is to administer the estate on the footing that the murderer is entitled to benefit in the

estate of the deceased or on the footing that the murderer has no right to benefit.. That can be answered in a case of this kind only by the court coming to a definite conclusion as to the sanity of the person at the time of the murder. In circumstances such as these, that is almost im-
A possible to establish. The man is dead. There is no possibility of his being prosecuted, and there are no means of proving his state of mind at the time. However, bearing in mind that this is a matter, not of criminal law at all, but of the administration of the estate, the position that, if a claim is made by a person on behalf of the deceased murderer or the person who
B has done the killing, it is for that person to show that the act was in fact not murder at all, but was a killing done under a condition of mind which rendered the act not murder at all. In the absence of any such evidence, the court can act only on the assumption that the death of the wife in this case was the result of the act of the husband, and, there being no evidence
C whatever to show the state of mind of the husband, the court must proceed on the assumption that that act was felonious, and, therefore, one which prevented any person claiming through the husband from benefiting from the wife's estate.

It is quite true that that is an assumption, and an assumption only.
D There is no evidence before the court on which the court can come to a definite conclusion, and, therefore, the administrator is left in the unhappy position that, although the court, on the evidence before it in this case, can come to the conclusion that the husband killed the wife, the court cannot definitely decide the state of mind of the husband at the time,
E and, if it were possible at any time for that state of mind to be proved, and it were shown that that assumption on which the court had acted was wrong, the executor might find himself in a very difficult position. However, that seems to me, in a case of this kind, to be an infinitesimal risk. I cannot conceive how anybody can ever at any time prove
F the state of mind of this man. In the circumstances, I must come to the conclusion that it is the duty of the administrator of the estate of the wife to act on the assumption that the husband was not entitled in any circumstances to benefit in any way from the estate of his wife.

G In *Re Sigsworth, Bedford* v. *Bedford* (3), Clauson, J., said, at p. 92:

> I am willing, for the guidance of the administrator, to decide the question of law which arises if Thomas Bedford Sigsworth murdered his mother and if she also died before him; but to decide only on that assumption. The administrator, if he acts on my decision, will take the risk that the assumption of fact may conceivably hereafter turn out to be erroneous.

H Then he held that the murderer or the killer was not entitled to benefit from the estate of the person who was killed. I think I can do no more than answer in this case that the residuary real and personal estate of Eveline Morton Pollock did not pass, in the events which happened, under her will to Hamilton Rivers Pollock, and that Eveline Morton Pollock died intestate as to such residuary real and personal estate. As I say, I think that what I ought to do is to give the administrator liberty to act on that assumption and to distribute the estate on the footing that the wife died intestate as regards the residuary real and personal estate.

Declaration that wife's estate could be distributed on the assumption that she died intestate. Costs of all parties as between solicitor and client, out of wife's estate.

Solicitors: *E. S. P. Haynes* (for all parties except the charities); *Horne & Birkett* (for the charities).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

LONDON ARMOURY CO., LTD. *v.* EVER READY CO. (GREAT BRITAIN), LTD.

[King's Bench Division (Tucker, J.), **February 26, 27, 1941.**]

Trade Marks—Importation of goods bearing trade mark—Indication of place of origin—Breach of statutory duty—Whether civil action available—Plaintiffs importers of foreign goods only—Merchandise Marks Act, 1926 (*c.* 53), *s.* 1.

The plaintiffs were importers of electric torch batteries for sale in the United Kingdom. The defendants were both manufacturers in the United Kingdom and also importers into the United Kingdom of electric torch batteries. The defendants' batteries, whether manufactured in the United Kingdom or imported, bore the trade mark of the defendants, but those imported had no indication of their place of origin, as required by the Merchandise Marks Act, 1926. The Act provides that a breach of its provisions shall be punished by the imposition of a fine by a court of summary jurisdiction, but provides no civil remedy for a party injured by the breach :—

Held : (i) upon the proper construction of the Act, the only remedy for a breach of its provisions was by prosecution in a court of summary jurisdiction, and the plaintiffs were not entitled to maintain an action for breach of statutory duty.

(ii) the plaintiffs, being merely importers of foreign goods, were not persons who could complain of a breach of these statutory provisions.

[**EDITORIAL NOTE.** The principles upon which a civil action, in addition to another remedy especially prescribed by the Act, can be brought in a case of breach of statutory duty were enunciated as long ago as 1859 in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1). . They have been slightly qualified since that decision, but for all practical purposes the judgment of Willes, J., in that case defines the circumstances in which the two remedies are available. However, the application of those general principles to a particular Act is generally, as here, a matter which can be settled only by a judgment of the court. It should be noted that, as pointed out in the concluding passages of the judgment, in the case of repeated violations of the provisions of an Act, it is possible for the injured party to obtain the more effectual remedy by way of injunction. To obtain this remedy, however, it is necessary to secure the intervention of the Attorney-General.

As to Trade Marks on Imported Goods, see HALSBURY, Hailsham Edn., Vol. 32, p. 669, para. 980; and for Cases, see DIGEST, Vol. 43, pp. 242, 243, Nos. 862-871.}

Cases referred to:

(1) *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859), 6 C.B.N.S. 336; 42 Digest 752, *1768*; 28 L.J.C.P. 242; 33 L.T.O.S. 366.

(2) *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832; 42 Digest 870, *197*; 93 L.J.K.B. 5; 129 L.T. 777.

(3) *Groves* v. *Wimborne (Lord)*, [1898] 2 Q.B. 402; 42 Digest 759, *1858*; 67 L.J.Q.B. 862; 79 L.T. 284.

(4) *David* v. *Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146; 34 Digest 219, *1816*; 78 L.J.K.B. 659; 100 L.T. 678; *on appeal*, [1910] A.C. 74.

(5) *Monk* v. *Warbey*, [1935] 1 K.B. 75; Digest Supp.; 104 L.J.K.B. 153; 152 L.T. 194.

(6) *A.-G.* v. *Premier Line, Ltd.*, [1932] 1 Ch. 303; Digest Supp.; 101 L.J. Ch.132; 146 L.T. 297.

Preliminary Issue of Law to determine whether the remedies under the Merchandise Marks Act, 1926, are restricted to the imposition of a fine by a court of summary jurisdiction or whether an action may be brought for breach of statutory duty. The facts and arguments are fully set out in the judgment.

G. R. Blanco White, K.C., and *W. A. L. Raeburn* for the plaintiffs.

G. O. Slade for the defendants.

Tucker, J.: I have to decide the question of law raised by para. 4 of the defence, which is in these words:

> The defendants will object that the statement of claim discloses no cause of action against them and that the plaintiffs are not entitled in law to the relief claimed or to any relief.

Therefore, in effect I am dealing with the statement of claim by way of demurrer, and accordingly I turn to the statement of claim, every allegation in which must be treated for the purpose of this legal argument as admitted. The three paragraphs of the statement of claim are as follows:

> The plaintiffs are large importers of electric torch batteries for sale in the United Kingdom. The defendants are manufacturers of a well-known brand of electric torch batteries, advertised to the public and marketed under a registered trade mark as "Ever Ready" batteries. The defendants also import electric torch batteries for sale in the United Kingdom. In or about Feb., 1940, and from time to time thereafter, the defendants, in breach of the duty imposed upon them by the Merchandise Marks Act, 1926, s. 1, unlawfully sold in the United Kingdom imported goods (being electric torch batteries) to which there was applied the name and trade mark of "Ever Ready" (being the name and trade mark of the defendants as aforesaid), without the said name or trade mark being accompanied by an indication of origin within the meaning of the Merchandise Marks Act, 1926. By reason of such breach of duty as aforesaid, the defendants have been able to sell and have sold such imported goods as aforesaid as and for British made goods and at the prices applying to British made goods, in consequence whereof the plaintiffs have been subjected to unfair competition and have suffered damage which, pending discovery or an account of the number of such imported batteries so sold by the defendants as British made goods, they provisionally estimate at £6,000.

Then certain relief is claimed—namely, an injunction, an account and damages.

The action is, therefore, one which is brought for breach of a statutory duty, and the statutory duty is that imposed by the Merchandise Marks Act, 1926, s. 1, which provides as follows :

> (1) It shall not be lawful to sell, expose for sale, or, by way of advertising goods of some other kind, distribute, in the United Kingdom, any imported goods to which there is applied any name or trade mark being, or purporting to be, the name or trade mark of any manufacturer, dealer, or trader or the name of any place or district in the United Kingdom, unless the name or trade mark is accompanied by an indication of origin . . . (3) If the Board of Trade are satisfied, after considering such representations (if any) as may be made to them by any persons appearing to the Board of Trade to have a substantial interest in the matter, that, having regard to the special circumstances of the trade, difficulties would arise if this section applied to goods of any class or description, or goods sold under any particular designation, and that public interests in the United Kingdom would not be materially prejudiced by exempting such goods from the operation of this section, they may direct that this section shall not apply to such goods, or that goods shall not be treated as falling under this section by reason only that they are so designated.

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B

I shall have to refer to other sections of the Act presently, but for the moment I refer to sect. 1, which is the section relied upon as having been infringed by the defendants, and which infringement is said to give the plaintiffs a right of action against the defendants. C

This raises the question, which has frequently come before the courts, as to the circumstances in which a private individual has a right of action for breach of a statutory duty. I refer to the authorities for the purpose of ascertaining the principles before proceeding to consider this particular Act. In *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1), WILLES, J., said, at p. 356 : D

> There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law : there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy : there, the party can only proceed by action at common law. But there is a third class, namely, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it . . . The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class.

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F

The last sentence of WILLES, J., must be considered in the light of further decisions which modified that statement to some extent, and the extent to which it is modified is, I think, to be found very clearly expressed in the judgment of ATKIN, L.J., in *Phillips* v. *Britannia Hygienic Laundry Co.* (2), at pp. 840, 841 : G

> In my opinion, when an Act imposes a duty of commission or omission, the question whether a person aggrieved by a breach of the duty has a right of action depends on the intention of the Act. Was it intended to make the duty one which was owed to the party aggrieved as well as to the state, or was it a public duty only ? That depends on the construction of the Act and the circumstances in which it was made and to which it relates. One question to be considered is, Does the Act contain reference to a remedy for breach of it ? *Prima facie* if it does, that is the only remedy. But that is not conclusive. The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals. Instances of this are *Groves* v. *Lord Wimborne* (3) and *David* v. *Britannic Merthyr Coal Co.* (4). To my mind, and in this respect I differ from MCCARDIE, J., the question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public.

H

In *Monk* v. *Warbey* (5), that statement of ATKIN, L.J., was quoted with approval, and MAUGHAM, L.J., said, at p. 85 :

> Like GREER, L.J., I think that the principle stated by ATKIN, L.J., [in *Phillips* v. *Britannia Hygienic Laundry Co.* (2)] was correct and that the question whether the Act or order is intended to give or to exclude a private remedy as ATKIN, L.J., said "is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public." The strongest case on the other side is *Groves* v. *Wimborne* (*Lord*) (3). The cases show that there are certain considerations for determining whether the intention of the statute is to preclude private remedy. First, the court has to make up its mind whether the harm sought to be remedied by the statute is one of the kind which the statute was intended to prevent : in other words, it is not sufficient to say that harm has been caused to a person and to assert that the harm is due to a breach of the statute which has resulted in injury.

These are the principles which I have to apply in this particular case, and I therefore turn to ascertain whether the Act is one which provides a penalty. Sect. 5 (1) (i) provides as follows :

> Every person guilty of an offence against this Act shall be liable on summary conviction to a fine not exceeding £5, and in the case of a second or subsequent offence to a fine not exceeding £20 and the court may in the case of a second or subsequent offence order the goods in relation to which the offence has been committed to be forfeited.

Then in this connection there is also sect. 6, which provides as follows :

> Where an employer or principal is charged with the offence of having acted in contravention of, or failed to comply with, the provisions of this Act or any order in council made under this Act he shall be entitled on information duly laid by him and on giving not less than three days' notice of his intention to the prosecution to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge, and, if after the commission of the offence has been proved, the employer or principal proves to the satisfaction of the court that he has used due diligence to enforce compliance with the provisions of this Act or of the order, and that the said other person had committed the offence in question without his consent, connivance or wilful default, the said other person shall, subject to the provisions of subsect. (5) of the last preceding section, be summarily convicted of the offence, and the employer or principal shall be exempt from any penalty . . .

There is the penalty, and, accordingly, the position is that, *prima facie*, that is the only remedy. However, that is not conclusive, and I have to look at the whole Act to ascertain from its scope and wording whether it was none the less the intention of the legislature that a person injured by a breach might have a remedy in the courts by way of damages or injunction in addition to proceeding by way of sect. 5 to enforce or secure a summary conviction.

I therefore turn to the Act and to the sections to which I have been referred as throwing any light on this question. I observe that it is described as :

> . . . an Act to require an indication of origin to be given in the case of certain imported goods.

I have already referred to sect. 1, which prohibits the sale of imported goods bearing a name or trade mark of a British manufacturer or trader unless it is accompanied by an indication of origin. It is an absolute prohibition against selling or exposing for sale or by way of advertising goods of that class. However, there is a provision in subsect. (3) to which I have already referred whereby the Board of Trade can exempt certain goods from the operation of the section, and, before deciding whether or not exemption shall be given, the Board of Trade are directed to consider such representations, if any, as may be made to them by any persons appearing to them to have a substantial interest in the matter. That is sect. 1. Sect. 2 deals with a different class of goods, namely, goods which are imported but bear no mark or name upon them—and the procedure with regard to those goods is that an inquiry may be held after a request has been made. Sect. 2 provides as follows :

> (1) After an inquiry in relation to goods of any class or description has on a reference from the appropriate department been held by a committee appointed for the purposes of this Act and the report of the committee on the matter has been taken into consideration by the department, that department may, unless it appears to them that the trade of the United Kingdom or the trade generally of other parts of His Majesty's dominions with the United Kingdom would be prejudiced if imported goods of that class or description for use or consumption in the United Kingdom were prohibited to be sold unless they bear an indication of origin, make a representation to His Majesty that it is desirable that an order should be made under this section, and His Majesty in Council may thereupon, subject to the provisions of this Act, make an order prohibiting the sale, or the exposure for sale in the United Kingdom, of imported goods of that class or description unless they bear an indication of origin . . . (3) No reference shall be made to a committee in respect of goods of any class or description unless there has been made to the department an application therefor which, in the opinion of the department, substantially represents the interests of either manufacturers, producers, dealers, traders, users, or consumers, or of any body of wage-earners . . . (5) If on an enquiry under subsect. (1) of this section it appears to a committee to be desirable that any imported goods should bear an indication of origin at the time of importation, and the committee so reports to the appropriate department, that department unless, having regard to all the circumstances of the case, including the re-export trade of the United Kingdom in that class or description of goods, it considers such action undesirable, may make a representation to His Majesty that it is desirable that the goods should bear an indication of origin at the time of importation . . .

Then it goes on to provide that an order in council may accordingly be made. Then subsect. (6) provides as follows :

> A committee after hearing persons representing such interests as may appear to the committee to be substantially affected shall, from time to time, and as soon as may be practicable in each case after an inquiry under subsect. (1) of this section make reports to the appropriate department specifying the classes or descriptions of imported goods, if any . . . with respect to which, in the opinion of the committee, an order in council ought to be made under this section, and the committee shall if it reports that such goods should bear an indication of origin, recommend what should be the form of the indication of origin and in what manner it should be applied to the goods.

I have already referred to sects. 5 and 6, and, of course, it is necessary to look at the Act as a whole.

It is argued by counsel for the plaintiffs that, looking at the Act as a whole, I ought to come to the conclusion that it is an Act designed to benefit and protect three classes of people—namely, (i) people who want to use an English trade mark on imported goods, (ii) people who sell English goods under an English trade mark, and (iii) people who sell imported goods as foreign goods—and that, if anyone can bring himself within one of those classes and can show that he has suffered damage, he has a right of action. He further relies on the fact that the penalty provided by sect. 4 is, in his submission, a small one, which might not be very effective for the purpose of securing the results desired, or, at any rate, might not be commensurate with the damage suffered by persons of the classes for whose protection he says the Act was designed.

I have considered the scope and wording of the Act as a whole, and I think that it is an Act designed for the benefit of the whole trade of this country, and there are numerous references in the Act to the public interest in the United Kingdom. In sect. 1 (3) there are the words :

> . . . and that public interests in the United Kingdom would not be materially prejudiced by exempting such goods . . .

Similar words appear in sect. 2 (1) :

> . . . unless it appears to them that the trade of the United Kingdom or the trade generally of other parts of His Majesty's dominions with the United Kingdom would be prejudiced . . .

Sect. 2 (5) uses the expression :

> . . . unless, having regard to all the circumstances of the case, including the re-export trade of the United Kingdom in that class or description of goods, it considers such action undesirable . . .

I think that, generally speaking, it is clear that the design of the Act was to protect the home trade in the general interests of the country, but I can find nothing in the Act which satisfies me that it was the intention of the legislature that any person who suffered damage by reason of a breach of the Act should have any remedy in addition to that provided by the Act itself in sect. 5. This kind of case is, in my opinion, very different from cases like *Groves* v. *Wimborne* (*Lord*) (3), *David* v. *Britannic Merthyr Coal Co.* (4) and *Monk* v. *Warbey* (5), where people who had suffered serious personal injuries through the breach of a statutory duty could derive no comfort or protection from the imposition of a fine by a court of summary jurisdiction. In those cases, it is not surprising to find the courts holding that such persons, being persons for whose protection the Act has been passed, should not be confined to their remedy by proceeding by way of summons in a petty sessional court. I think that this is a different kind of Act, and persons who suffer from breaches of this Act in their trade are in a very different position from workmen or other people who may be injured, as in the cases to which I have referred. Therefore, I have come to the conclusion that this Act of Parliament is not one which intended, and which the legislature must be taken to have intended, to confer upon injured persons the right to sue in the courts as well as to proceed before justices.

However, there is a narrower ground upon which I think the defendants would be entitled to succeed on this point, and that is that, in any event, assuming, contrary to my view, that there may be some traders or persons who could bring an action for breach of this statute, in my view the plaintiffs do not come within that class of persons. I turn to para. 1 of the statement of claim to ascertain the status of the plaintiffs in this matter, and I find that they are simply described as “ large importers of electric torch batteries for sale in the United Kingdom.” Whatever may be the position under this Act with regard to persons who manufacture goods within the United Kingdom, in my view, the Act was not designed for the protection of importers of foreign goods for sale in the United Kingdom. In this particular case, what the plaintiffs are in effect saying is this : " We and the defendants before this Act was passed were entitled to import into this country goods to which there was applied a 'name or trade mark, being or purporting to be the name or trade mark of any manufacturer, dealer or trader or the name of any place or district in the United Kingdom.' " They were both at liberty, before this Act was passed, to import goods bearing those indications. Now the plaintiffs say : " We have kept the law, but the defendants have not, and, therefore, we are entitled to damages and an injunction." In my view, they cannot maintain that position. I think that, even if I am wrong on the broader ground on which I have decided this case, the plaintiffs would fail to show that they, being merely importers of foreign goods, could in any case come to the court and complain of a breach of this statute and recover damages.

There is only one further matter to which I need refer, and that is this: Counsel for the defendants cited *A.-G.* v. *Premier Line, Ltd.* (6), a case which arose under the Road Traffic Act, 1930, whereby the maintenance of certain coach services was prohibited except under licence. In that case, the defendants began to operate a service of express coaches over a route between London and Aylesbury, and they applied for a road service licence. That application was refused, but none the less they continued to maintain the service. They were prosecuted and convicted, and, despite the conviction, they still continued to maintain the service. An action was brought by the Attorney-General at the relation of other owners of motor coaches holding licences to operate on the same route for an injunction to restrain the defendants from continuing their service. In giving judgment, Eve, J., said, at p. 313 :

> The general rule is that where an Act creates an offence and provides a remedy, the only remedy is that provided by the statute, and had this action been commenced and prosecuted by the relators it is, I think, pretty clear that the objection of the defendants to the maintenance of this action would have prevailed.

However, that case none the less shows, in my view, that, in a case like the one with which I am dealing, where a public duty is imposed upon traders, if they repeatedly disregard the Act, despite conviction at petty sessions, there remains the remedy which can be pursued by the intervention of the Attorney-General by way of an injunction. I think that that is a relevant matter to be considered when it is argued that only a small penalty can be imposed under sect. 5. For these reasons, I decide that para. 4 of the defence is a good and valid plea, and that the statement of claim does not disclose any cause of action.

Solicitors : *A. L. Solomon* (for the plaintiffs) ; *Bentleys, Stokes & Lowless* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

THE GLENEARN.

[Probate, Divorce and Admiralty Division (Lord Merriman, P.), **February 26, 1941.**]

Prize Law—Ownership of goods—Exchange of goods immediately before hostilities—Public policy.

On Aug. 23, 1939, the Glenearn, a British ship, arrived at London. Part of her cargo was 20 tons of rubber consigned to a German company. The ship was bound for Hamburg, but, owing to the possibility of war, she did not continue her voyage beyond London and the cargo of rubber was there discharged. The claimants, a British company, had several consignments of rubber consigned to the same German company, and it was agreed that for the above consignment, for which payment had been made, there should be substituted another consignment on another ship bound direct for Germany. No payment had been made for the latter consignment, but the relevant documents were exchanged through a Dutch firm. The documents relating to the above 20 tons reached the claimants on Sept. 1, 1939, and on the same day they instructed their agents to take delivery of it in London. Delivery was taken about one week after the commencement of war and the rubber was later seized as prize. It was admitted that the property in the rubber would have passed to the claimants under English law before the outbreak of war :—

Held : (i) as the property in the rubber was vested in the claimants before the outbreak of war, there was no trading with the enemy, and the fact that war was imminent at the time, did not make the agreement for the exchange of the cargoes one against public policy.

(ii) the delivery to the claimants' agents was, in the circumstances, a sufficient delivery to them, and, as such delivery was complete before seizure and was, although made to agents, an actual delivery and not merely a delivery of documents of title, the seizure was invalid.

[**EDITORIAL NOTE.** The main contention in this case was that the arrangement for the exchange of cargoes was a fictitious transaction and one designed to defeat the principle that British subjects must not trade with the enemy. It is pointed out, however, that there can be no trading with the enemy before the outbreak of war and, therefore, as the whole transaction was complete in law before the commencement of the war, there could be no offence against any doctrine of public policy.

As to Transfer of Ownership of Goods, see HALSBURY, Hailsham Edn., Vol. 26, p. 221, paras. 501-503; and for Cases, see DIGEST, Vol. 37, pp. 587-589 Nos. 226-257.]

Cases referred to :

(1) *The Jan Frederick* (1804), 5 Ch.Rob. 128 ; 37 Digest 585, *202*.

(2) *Sorensen* v. *R.*, *The Baltica* (1858), 11 Moo. P.C.C. 141 ; 37 Digest 579, *115* ; 30 L.T.O.S. 342 ; *revsg.* (1855), Spinks, 264.

(3) *The Southfield* (1915), [1917] A.C. 390, n. ; 37 Digest 569, *6* ; 85 L.J.P. 78 ; 113 L.T. 655.

(4) *The Daksa*, [1917] A.C. 386 ; 37 Digest 585, *207* ; 86 L.J.P.C. 130 ; 116 L.T. 364.

(5) *The Kronprinsessan Margareta, The Parana*, [1921] 1 A.C. 486 ; 37 Digest 636, *866* ; 90 L.J.P. 145 ; 124 L.T. 609 ; *affg. The Kronprinsessan Margareta, The Thai*, [1917] P. 114.

(6) *The Roumanian* [1916], 1 A.C. 124 ; 37 Digest 593, *291* ; 85 L.J.P.C. 33 ; 114 L.T. 3 ; *affg.*, [1915] P. 26.

(7) *The Marie Anne*, Rothery 126.

(8) *The Vesta, etc.* [1921] 1 A.C. 774 ; 37 Digest 586, *219* ; 90 L.J.P. 250 ; 125 L.T. 261.

(9) *The Bawean*, [1918] P. 58 ; 37 Digest 582, *170* ; 87 L.J.P. 100 ; 118 L.T. 319.

Application for the condemnation of cargo on the ground that it was enemy property. The facts are fully stated in the judgment.

Cyril T. Miller for the claimants.

B. J. M. MacKenna for the Procurator-General.

Lord Merriman, P.: In this case, the Crown seeks a decree of condemnation of 198 drums of Latex weighing about 20 tons, which were originally part of the cargo of the Glenearn, but were seized at London on Oct. 9, 1939. On Dec. 19, 1939, a British company named Revertex, Ltd., entered an appearance, and have since filed a claim, the grounds of which are that they are, and were at all material times, an English corporation, and the sole owners of the 198 drums of Latex. The case presents some curious features, and in the course of the argument, which was admirably conducted on both sides, many points were raised. The result of the discussion, however, was to show that about many of these points there was ultimately no conflict. My conclusions on these matters will appear incidentally in dealing with the two main points which emerged for decision, and it will be unnecessary in this judgment to follow all the ramifications of the argument.

The facts, about which there is no serious dispute, though in one important respect there is very grave dispute as to the proper inference to be drawn from them are these. On Apr. 18, 1939, the claimants entered into an agreement, in prolongation of an earlier agreement, with the Metall Aktiengesellschaft of Frankfurt a/Main (hereinafter called the German company) for the exclusive sale by the claimants to the German company, for re-sale by itself or its subsidiaries in specified countries, of their production of Revertex, of which the product Latex is a brand. I will use the word "Latex" throughout, to distinguish the product from the company. One of such subsidiaries was a German company called Kautschuk Gesellschaft (hereinafter referred to as the German subsidiary), and it is common ground that the German company's rights under the agreement, so far as it relates to this particular cargo, were vested in the German subsidiary. I will refer to the agreement, in its relation to this claim, as the German agreement.

Latex is a rubber product, and the goods in question were manufactured for the claimants by the Sedenak Rubber Estates, Ltd., an English company, of which Messrs. Yule, Gatto & Co., Ltd., are secretaries, whose estate is situate in Johore. The goods in question are, therefore, of British origin. It is unnecessary to examine the German agreement in great detail. Suffice it to say that the price of Latex sold thereunder is calculated on the basis laid down in para. 1 of the second schedule and on the date defined in para. 2. The relevant date for calculating the price in respect of this cargo was Sept. 4, 1939. By para. 5 of the same schedule, the sales were to be on c.i.f. terms, and the insurance was to be of the type customary for c.i.f. contracts, with certain limitations regarding the question of war risks. The only other provisions to which

I think I need refer are contained in paras. 7 and 11 (*c*) (ii) of the schedule, whereby it is provided that the weight sold is to be the weight of the total solid content as ascertained on the estate. The weights and the analyses recorded in an official weight note to be signed by the manager of the estate as one of the shipping documents was to be accepted by both parties as correct.

It is clear from the documents relating to this cargo that the 198 drums in question were ascertained goods within the meaning of the Sale of Goods Act, 1893, at the time of the shipment. As appears from the bills of lading, the 198 numbered drums were consigned to order at Hamburg, and were the only goods included in the bills of lading. The Glenearn arrived in the Port of London on or about Aug. 23. Having regard to the international situation, the voyage from there to Hamburg was abandoned. This fact became known to the claimants on Aug. 25. It happened in the ordinary course of business under the German agreement that two other cargoes of Latex were also on their way to the German subsidiary. These cargoes were on board ships named the Leverkusen and the Gneisenau, both German ships. Of the Leverkusen's cargo, 5 tons had been landed at Genoa, at which port 10 tons of the Gneisenau's cargo had also been landed. The Leverkusen proceeded on her voyage to Hamburg with 25 tons of Latex, as did also the Gneisenau with 10 tons on board. I was informed that the price-fixing date in respect of the 5 tons discharged by the Leverkusen at Genoa was Aug. 17, while Aug. 21 was the date in respect of the 10 tons discharged there by the Gneisenau, and that the price-fixing dates in respect of the Hamburg consignments were Sept. 6 for the Leverkusen's goods and Sept. 10 for the Gneisenau's goods. The claimants had not been paid in respect of either of the consignments discharged at Genoa, which were under their control at that port through their agent there. Nor had they been paid in respect of the balance of the goods en route for Hamburg in either ship. In addition, the Japanese ship Terukuni Maru had left Singapore about Aug. 19 with 21½ tons of Latex, also for the German subsidiary, for which the claimants had not been paid. On the other hand, on or about Aug. 16 the claimants had handed over the shipping documents in respect of the Glenearn cargo against acceptance of a bill of exchange for the price named in the provisional invoice. Therefore, when the claimants learned of the abandonment of the Glenearn's voyage from London to Hamburg, the position was as follows. Subject to the final fixing of the price under the German agreement, the claimants were sellers of ascertained goods who had parted with the documents of title, and had been paid, subject to adjustment one way or the other when the price was finally determined. On the other hand, in respect of the goods in the other three ships, they were unpaid sellers, who had not parted with the documents of title. In these circumstances, on Aug. 28, an arrangement was come to between the claimants and the German subsidiary which is set out in the claimants' affidavits. Shortly, the arrangement was as follows. The 15 tons discharged at

Genoa and the 5 tons of the Leverkusen's cargo en route for Hamburg were to be exchanged for the 20 tons which by that time had been, or were in process of being, discharged into the Port of London Authority's warehouses. It was a term of this arrangement that the claimants should be paid for the remaining 20 tons in the Leverkusen. The German subsidiary later undertook also to pay for the goods in the Terukuni Maru. The claimants were able to intercept the 10 tons in the Gneisenau at Rotterdam, and no further reference to these goods is, therefore, necessary.

Though this arrangement was referred to by the parties, and throughout the argument, as the exchange agreement, it was intended to carry it out in accordance with the German agreement. That is to say, the respective prices would be worked out in accordance with that agreement. Accordingly, by letter from the German subsidiary dated Aug. 30, confirming the arrangement, it was suggested that the price-fixing date for the whole of the 25 tons in the Leverkusen should be Sept. 4, which, it will be remembered, was the date in respect of the Glenearn shipment. The extent to which the cross-payments had actually been adjusted before war broke out is left somewhat obscure. It is clear that the shipping documents were exchanged through Messrs. Pierson in Amsterdam, but, apparently, no financial adjustment was made through them. The shipping documents in respect of this cargo, other than one copy of the bill of lading which was still in the mail, were received by the claimants from Messrs. Pierson on or about Sept. 1. The claimants were paid, as had been arranged, for the Latex in the Leverkusen, subject to the final adjustment of the price, and I was informed that the balance subsequently ascertained to be payable by the claimants in respect of the exchange agreement as on Sept. 4 was £143 3*s*. 5*d*., calculated as follows. In respect of the Gleanearn Latex, the final price was £1,676 14*s*. 11*d*., and the final price in respect of the corresponding 20 tons out of the Leverkusen and the Gneisenau respectively was £1,533 11*s*. 7*d*. However, the claimants had not merely to pay, as buyers, for the Glenearn Latex. They actually held the bill of exchange for the provisional invoice price originally payable to them as sellers, which I understand was met in due course. Therefore, on becoming buyers, instead of sellers, of this cargo, they would be obliged somehow or other to refund this amount. I was not informed at the hearing when and how, if at all, this was done, and subsequent inquiries made by counsel at my request have been abortive. It may be that the amount was set off against the payments made to the claimants in respect of the Latex in the Leverkusen, or in one of the other ships I have mentioned. However, if, as I assume was probably the case, the final settlement was left over until after the revised price-fixing date, no commercial settlement can in fact have taken place, and the same, of course, applies to the sum of £143 3*s*. 5*d*. itself.

From the foregoing, it is clear that, assuming that the 15 tons discharged at Genoa were "specific" goods, though I had no precise information on the matter, the 5 tons out of the 25 tons still in the Leverkusen, which formed the balance of the exchange, were clearly unascertained goods. On the other hand, the Latex in question out of the Gleanearn was still "ascertained." It was not disputed that, regarding this sale of these goods to the claimants by itself, the property had repassed, in accordance with the rules laid down in the Sale of Goods Act, 1893, s. 18, before the outbreak of war. By letter dated Sept. 1, 1939, the claimants instructed one of their usual warehousemen, British Bluefries Wharfage and Transport, Ltd., to make the necessary arrangements for the clearing of these goods, pay all the charges due to the Port of London Authority, and take the goods to store as soon as possible. On or about the same date, and before the outbreak of war, the warehousemen sent the bills of lading, which they had received from the claimants, to the Port of London Authority. It is common ground, however, that they did not take delivery from the Port of London Authority's warehouse until Sept. 11, and the landing account shows that the goods were received into store in their own warehouse on Sept. 12, where they were seized as prize on Oct. 9, 1939, as I have already said.

The claimants have sworn, there is no evidence to the contrary, and I so find, that they have no warehouse of their own, and that the normal procedure is for the warehousemen I have mentioned, or another firm, to take delivery of the goods on the arrival of the ship and to store them for the claimants until they are wanted for delivery to their customers. The claimants in their affidavit admitted that the exchange agreement, as I shall call it for convenience, was affected in view of the international tension prevailing at the time, with specific reference to the facts that the goods at Genoa would be lost to them if Italy were involved in war, and that they had not been paid for the goods en route for Hamburg, or for those in the Terukuni Maru, but they say in effect, and I see no reason to doubt the statement, that they were really concerned with the protection of their own commercial interests, and were not considering the matter in relation to prize law. Nevertheless, they must be taken to intend the natural consequences of their action. It is plain beyond any doubt, and I so hold, that the exchange agreement was made *imminente bello*, in avowed contemplation of the difficulties which would arise if war broke out, as in fact it did within a week. If, therefore, this transaction is contrary to the law of prize, they must take the consequences, nor, indeed, need any special sympathy be wasted upon them if that is the result. On the other hand, I am satisfied—and about this also there is no dispute—that the exchange agreement was made *bona fide*, in the sense that there was no secret or collusive understanding that it was to be disregarded if, contrary to expectation, war should not break out. It was to be performed, in any event, according to its tenor.

From this recital of the facts as I find them, and about which there is little or no dispute, two things are evident. The exchange agreement has, on the one hand, enabled the German subsidiary to obtain possession, possibly after the outbreak of war, of the 15 tons of Latex at Genoa over which the claimants had control, while, on the other hand, it has enabled the claimants to assert that the 20 tons the subject of this claim, which, but for the arrangement, would have been enemy property in a port of this country, and, as such, might have been liable to seizure on the outbreak of war, was their property, and so exempt from seizure. Clearly, therefore, the circumstances require careful scrutiny. Counsel for the Procurator-General argued that a bargain of this kind, made by a British subject immediately before the outbreak of war and, as is admitted, in contemplation of war, is void as being contrary to public policy. Alternatively, he argued—and this is the second of the two points about which, in my opinion, there is any serious controversy—that the goods were still *in transitu*, as that term is understood in prize law, inasmuch as the claimants had never taken actual delivery themselves, but had done so only through their agents, the warehousemen.

I will deal first with the question of public policy. Counsel for the Procurator-General lays stress on the temptation to defraud and deceive the government which the recognition of the lawfulness of such a transaction as this would throw in the way of persons minded to be fraudulent. I recognise the justice of that contention, but that of itself does not seem to me to be a valid reason for condemning goods in respect of which, whatever may be the merits or demerits of the transaction, there has in fact been no element of deceit. The common law of England and the legislation relating to trading with an enemy—a phrase which I am using in its widest sense—forbids any form of commerce with the enemy, but, as the word implies, that assumes that the commerce is transacted after war has broken out. If public policy so required, it would have been open for Parliament to say that transactions with a potential enemy, though concluded before the outbreak of war, should, in circumstances to be defined, be prohibited. As far as I am aware, the legislature has not chosen to do so, and I asked in vain for any authority for the proposition. I do not think that it is for the courts to invent doctrines of public policy in such matters. I can see grave difficulties in any attempt to do so. It would be easy to imagine circumstances in which the most innocent transactions would operate to defeat the potential rights of captors.

It seems to me to be reasonably clear that the purchase of the Glencarn's cargo, taken by itself, did not offend any existing legislation. The capacity in which the Port of London Authority held the goods on the outbreak of war was the subject of some discussion. Counsel for the claimants contended that the Port of London Authority, having received the bills of lading before Sept. 3, and having subsequently handed over the goods on payment of their dues, must be taken retrospectively to have attorned to the claimants before war broke out. He was unable to give me any authority for this proposition. In my opinion, it is unsupported by evidence, and is unsound. Eventually, both counsel accepted that the true view was that the goods were held in the intermediate position described in the notes to CHALMERS' SALE OF GOODS ACT, 11th Edn.,

p. 117, s. 44. Assuming them to be held for the owner, whoever he might be, counsel for the Procurator-General argued that, *transitus* as understood in prize law not being ended, they must be taken to have been held for the German seller. I will revert later to this point in relation to prize law. Dealing with it, for the moment, in relation to trading with the enemy legislation, counsel for the Procurator-General agreed that English municipal law would apply. He admitted that, in English law, the property in the 198 drums had passed to the claimants. It follows, therefore, that the obtaining of delivery by the claimants' warehousemen from the Port of London Authority, which alone occurred after the outbreak of war, was not the obtaining of goods from an enemy, but was the obtaining of his own goods, in which the property had passed to him before war broke out, by a British subject from bailees who were also British subjects. This disposes of the only suggested infringement of trading with the enemy legislation regarding the Glenearn cargo by itself. I confess, however, that I have been troubled by the element of exchange or barter, for, if the whole exchange agreement is regarded as a single transaction, there is the element, to which I have already alluded, that, although delivery of, and payment for, the Genoa consignments were made before war, and although the property in them had passed, it was at least a possible, if not a probable, result that the German subsidiary would thereby be enabled to obtain actual possession after the outbreak of war of a large quantity of Latex of which they would otherwise have been deprived. However, no evidence was tendered by the Crown on this point, nor was any application made to cross-examine the claimants on their affidavits, and no great stress was laid on the fate of the Genoa consignments, whatever the facts regarding them might prove to be. The real emphasis was all upon the defeat of the potential rights of capture of the Glenearn cargo.

On consideration, I am satisfied that it must always have been intended to carry out the so-called exchange agreement by separate transactions under the German agreement. In my opinion, the German subsidiary's letter of Aug. 30, the express object of which was to alter the price-fixing date in respect of the whole of the Leverkusen's cargo so as to coincide with that in respect of the Glenearn's cargo, supports this view. I think, therefore, that the transaction in respect of the Glenearn's cargo stands or falls by itself. I do not overlook the fact—which applies equally whether the Glenearn's cargo alone or the exchange agreement as a whole is regarded—that the date arranged for the price-fixing was Sept. 4, but although he afterwards withdrew the admission, I think that counsel for the Procurator-General was right in the first instance in attaching no importance to the point. This revised date was fixed before war broke out. From this, the calculation of the respective prices followed automatically under cl. 2 of the schedule to the German agreement, and all questions of weights and analyses would have been settled conclusively before the goods left the claimants' estate under cll. 7 and 11 (*c*) (ii) of the schedule. The mere fact that the adjusted balance of the price, payable, as proved to be the case, by the claimants, could only, as I assume, be dealt with through the Custodian of Enemy Property, does not seem to me to affect the matter. For the reasons I have indicated, I am not prepared to hold that any doctrine of public policy can be in- A voked by the Crown.

I now turn to the prize law governing the matter. Where, under a contract for the sale of goods made before the outbreak of war between an enemy seller and a neutral buyer, the transfer of the property in the goods is made while the goods are still *in transitu*, the following propositions B appear to be clearly settled. First, if it is proved that the contract was made in the ordinary course of business, and not in contemplation of war, and was a *bona fide* transaction in the sense that there was no fraudulent or collusive reservation of interests to the seller, then, although the buyer has not taken actual delivery before seizure, his claim is recognised C in prize. Secondly, if, however, the contract, though made *bona fide* in the above sense, was made in contemplation of the outbreak of war, the buyer cannot establish his claim to the goods unless he has taken actual delivery before seizure. : *The Jan Frederick* (1), *Sorensen* v. *R.*, *The Baltica* (2), *The Southfield* (3), *The Daksa* (4) and *The Kronprinsessan* D *Margareta* (5). These provisions are subject, in the case of a British buyer, to at least two qualifications—namely, (i) no considerations founded on the comity of nations can apply, and (ii) a British claimant is subject, as a neutral claimant is not, to the municipal law concerning trading with the enemy, so far as it affects the matter. However, it E does not seem to me that those qualifications afford any reason for putting a British subject in a more favourable position as regards transfer *in transitu* than a neutral would be. Counsel for the claimants admitted —nor could I possibly hold otherwise, on the facts—that this transaction was made in contemplation of war between Great Britain and Germany, F and, incidentally, in the expectation of Italy being immediately involved. It follows that nothing less than actual delivery will avail the claimants. Counsel for the claimants argued, and desired to reserve the point if it was not open to him in this court, that the term "transit" in prize law applies only to goods which are at sea at the outbreak of war. He G founded this argument on a passage in *The Roumanian* (6) referring to enemy goods on British ships "whether on board at the commencement of the hostilities or embarked during the hostilities": see also the words "while at sea" in the passage cited in *The Kronprinsessan Margareta* (5). It may be an interesting question whether these expressions can be taken H literally without the qualification provided by passages in *The Roumanian* (6), at p. 136, to the effect that goods warehoused in a port or harbour of the realm at the outbreak of war are regarded as still being *in transitu*: see, in particular, the reference to *The Marie Anne* (7) in *The Roumanian* (6), at p. 142, and the words "so long as the original *transitus* is deemed to continue" used by LORD SUMNER in *The Vesta* (8). In the view I take of this case, it is not necessary to express a final opinion on the point, or upon the contention of counsel for the claimants that actual delivery took place in the Port of London Authority's warehouse. I will merely assume in favour of the Crown—but without being taken to express any real doubt that the assumption is correct—that in the Port of London Authority's warehouse the goods were still in transit, and that, if they had been seized there, the claimants would have failed. However, they were not seized until the claimants' warehousemen had removed them and taken them into store in their own warehouse. Counsel for the Procurator-General, relying on *The Bawean* (9), argued that delivery to agents could not avail the claimants. Every company, however, must act through human agents, and in this case the evidence is uncontradicted that the claimants have no warehouse of their own, and invariably store with this, or another named, warehouse company. Symbolic delivery, in accordance with the custom of merchants, by the transfer of shipping documents, whether personally or by agents, is on one side of the line, and I will assume, again without expressing a final opinion, that constructive possession by an agent for the purpose of, and in the course of, delivery to the claimants' own warehouse would be on the same side of the line. In this case, however, I think that the claimants took actual delivery, at the latest, on the arrival of the goods at the warehouse of their warehousemen in the only way in which, as a matter of practical business, in their individual circumstances, they could take actual delivery of the goods. This seems to me to be on the other side of the line, and this had been done before seizure by the Crown. This view of the matter is, I think, supported by the opinion of LORD SUMNER in *The Vesta* (8). For these reasons, I hold that the claimants have established their claim, and are entitled to judgment for the release of the goods accordingly.

Solicitors: *Mayo, Elder & Co.* (for the claimants); *Treasury Solicitor* (for the Procurator-General).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

NOTE.

MILLER *v.* LIVERPOOL CO-OPERATIVE SOCIETY, LTD.

[COURT OF APPEAL (Scott, Mackinnon and du Parcq, L.JJ.), **March 7, 1941.**]

Without calling upon counsel for the respondent, the court dismissed the appeal of the defendant, the Liverpool Co-operative Society, Ltd., from the judgment of STABLE, J., reported [1940] 4 All E.R. 367.

LUIS DE RIDDER, LTD. *v.* ANDRE & CIE. S.A. (LAUSANNE)

[King's Bench Division (Viscount Caldecote, L.C.J.), **February 11, 1941.**]

Sale of Goods—C.i.f. contract—Contract in common form—Special clause as to service of notices added—Compliance with special clause condition precedent.

In a contract of sale c.i.f., which contained a common form appropriation clause, a further clause was inserted providing that all notices had to be sent to the buyers' agents in a certain place, and that documents also had to be sent there for payment. Such notices were in fact sent to the buyers personally in another place. It was contended that compliance with the provisions of the added clause was a condition precedent to the right to enforce the contract :—

Held : the added clause was a contract, strict performance of which was required. It was a stipulation going to the root of the contract, and, therefore, overrode the appropriation clause.

[**EDITORIAL NOTE.** Where a clause is specially added to a common form contract, it is the general rule that it was added to give effect to the particular circumstances of the contract, and is, therefore, one which overrides the provision to the same effect in the contract itself. When such additions are made, it is usually desirable that the original clause should be deleted and a whole new clause included in its place. Unfortunately, it is a common practice to leave the original clause standing with the new clause which conflicts with it in whole or in part. When this is done, it frequently leads to litigation to decide which clause is to prevail.

As to Appropriation Clause in C.i.f. Contract, see HALSBURY, Hailsham Edn., Vol. 29, pp. 218, 219, para. 290 ; and for Cases, see DIGEST, Vol. 12, pp. 414-417, Nos. 3340-3353.]

Cases referred to :

(1) *Graves* v. *Legg* (1854), 9 Exch. 709 ; 12 Digest 416, *3351* ; 23 L.J.Ex. 228 ; 23 L.T.O.S. 254 ; *subsequent proceedings, sub nom. Greaves* v. *Legg* (1856), 11 Exch. 642 ; *sub nom. Graves* v. *Legg* (1857), 2 H. & N. 210.

(2) *Kidston & Co.* v. *Monceau Ironworks Co.* (1902), 86 L.T. 556 ; 12 Digest 415, *3345.*

Special Case Stated in an arbitration between the buyers, Andre et Cie., S.A., Lausanne, and the sellers, Luis de Ridder, Limitada, to determine the effect of the appropriation clause in the contracts made in Jan., 1940. The parties agreed by two contracts for sale to sell the buyers in Switzerland Argentine maize from Buenos Aires amounting altogether to 1,000 tons. It was agreed that shipment was to be made in May, c.i.f. Antwerp. The form of the contracts was the London Corn Trade Association's contract with its common appropriation clause, but there was a special clause attached to the contracts providing that all notices must be sent to the buyers' agents in Antwerp and that the documents must be presented to those agents for payment. The maize was shipped by the sellers on the Atlantico, and the bill of lading was dated May 16, 1940. The sellers instructed their agents in London to give notice of appropriation accordingly. By that time the invasion of Belgium had taken place, and on May 19, 1940, Antwerp was occupied by enemy forces. Although the Atlantico was intercepted and her cargo was requisitioned by the British government, the contract was on c.i.f. terms, and, therefore, the buyers' liability to pay was not affected by the interception and requisitioning. The sellers' agents were unable to communicate with the buyers' agents in Antwerp, and on May 25, 1940, they sent the notice of appropriation to the buyers themselves at Lausanne. However, the buyers refused to accept the notice themselves, contending that, by the terms of the contract, it should have been given to their agents at Antwerp. The matter went to arbitration, when an award was made in favour of the sellers. The buyers appealed.

Patrick Devlin for the appellants, the buyers.

Cyril T. Miller for the respondents, the sellers.

Devlin: As the contract expressly provides that notice must be given to the buyers' agents in Antwerp, the sellers cannot at their own option substitute therefor a power to give notice to the buyers themselves.

Miller: Although the contract expressly provides that notice must be given to the buyers' agents at Antwerp, that provision cannot be treated as a condition precedent.

Viscount Caldecote, L.C.J.: In this case, in my opinion, the appeal committee have come to a wrong conclusion. The facts are stated in the special case, and I need not repeat them, but it is necessary to say that in this contract for a c.i.f. delivery at Antwerp there was a condition which was called in the marginal note the appropriation clause, providing that notice of appropriation, with ship's name, should be cabled by the shipper of the grain direct to his buyer or to his house or representative or agent in Europe and be passed on by his buyer, and by each subsequent seller to his buyer, and so on. For reasons as to which everybody is left in ignorance, a clause was added to the contract to the effect that all tenders and notices were to be made to André & Co. (Belge), Antwerp, that documents were to be presented to them, and that payment must be made in Antwerp against documents. The clause itself is not forthcoming, but that is the effect of it.

The question which arises is whether a notice of appropriation which, if that clause had not been added to the contract, might have been given to the principals or their agents is a good notice of appropriation which the buyers must accept notwithstanding the fact that it was made not to André & Co. (Belge), Antwerp, but to the principals. For reasons which have been mentioned in the course of the argument, I think that it was of importance to the parties to have the clause complied with strictly if the clause was added to the contract, as it was. The argument which has been submitted on behalf of the buyers was, first, that the clause was not complied with, and, therefore, without any necessity of assent as to whether it was a condition precedent, the buyers were not obliged to accept the notice. I am bound to say that I agree with that argument. The clause, it is to be observed, so far as it is possible to ascertain its terms, is a clause which provides for tenders and notices to be made to André & Co. (Belge) and for documents to be presented to them and payment to be made in Antwerp, and I see no reason for supposing that the last part of the clause was a contract strict performance of which was required while the first part of the clause might or might not be performed, and, if not carried out, would give rise to no more than a right of compensation in damages. That, perhaps, is sufficient to answer the second question left to me—namely, whether or not there was a valid notice of appropriation by the sellers which the buyers were bound to accept.

The argument further submitted by counsel for the respondent sellers that this was not a condition precedent is one about which I may say a word. In my view, it was a condition precedent, and *Graves* v. *Legg* (1) and *Kidston & Co.* v. *Monceau Ironworks Co.* (2), which have been cited by counsel for the respondent sellers, seem to me to illustrate very well the considerations to which the court might direct its attention in deciding such a question. The stipulation here was quite definite. It seems to me to be a clause which, in the circumstances in which the contract was made, the buyers might have had very good reason for inserting, and, considering the question from the point of view of whether the stipulation went to the root of the contract, and whether it was of its pith and essence, I think that it was. I think that the buyers intended that this clause should override the provisions of the appropriation clause, to the terms of which I have referred. That being so, there was no compliance with a clause in the contract which, whether it be a condition precedent or not, is a stipulation which must be complied with before the contract can be performed. In those circumstances, the first question submitted to me does not really arise. It is now quite impossible for the sellers to perform their contract, and, if the question requires to be decided, I am prepared to say that the contracts have been cancelled and were cancelled prior to May 25, 1940, by virtue of the prohibition clause in the contract. I do not think that the question arises really as to the further point which has been taken about the Trading with the Enemy Act, 1939, and I need not express any opinion on that. On the point of law left to the court, I answer in favour of the appellant buyers.

Appeal allowed with costs.

Solicitors: *Richards, Butler & Co.* (for the appellants); *Thomas Cooper & Co.* (for the respondents).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

BROWNE AND OTHERS *v.* DE LUXE CAR SERVICES AND BIRKENHEAD CORPORATION.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Scott and Goddard, L.JJ.), **February 20, 21, 1941.**]

Tramways—Repair of road—Tramway operated by local authority—Tramway discontinued and lines filled in but rails not removed—Liability for repair of road as tramway authority—Tramways Act, 1870 (*c.* 78), *s.* 28.

In 1932, the tram service along a certain road which had been operated by the corporation, the second defendants, was discontinued. The tramlines were subsequently filled in with bitumen. The road itself was constructed of granite setts, which had become worn and were very slippery in wet weather. On June 27, 1939, a motor car, in passing a lorry, skidded and killed one person, injured two others, and damaged the property of a fourth. The evidence proved that the driver of the car was driving in a perfectly proper manner, and attempted to pass the lorry in a perfectly proper way, but it was found that the accident was due to the fact that the setts had become worn and were not in a proper condition:—

HELD: in the circumstances and upon the proper construction of the Tramways Act, 1870, s. 28, the tramway had not been abandoned, and the corporation were liable as a tramway authority. The corporation were, therefore, liable for non-feasance, and the plaintiffs were entitled to recover damages from them.

Decision of STABLE, J. ([1940] 4 All E.R. 330) *reversed on this point.*

[**EDITORIAL NOTE.** In the court below, the fact that no trams had been run since 1932 was held sufficient to show that the undertaking had been abandoned within the meaning of the Tramways Act, 1870, s. 28. The Court of Appeal have reversed this finding, holding that, so long as the track remains in the road, the corporation, as undertakers, are liable to keep it in repair, as required by the 1870 Act. If they desire that their liability shall be only that of a highway authority, they must remove the rails and make good the surface of the roadway.

AS TO LIABILITY OF TRAMWAY AUTHORITY FOR REPAIR OF ROAD, see HALSBURY, Hailsham Edn., Vol. 32, pp. 716, 717, para. 1038; and FOR CASES, see DIGEST, Vol. 43, pp. 344-346, Nos. 33-49.]

Case referred to:

(1) *Dublin United Tramways Co.* v. *Fitzgerald*, [1903] A.C. 99; 43 Digest 344, *37*; 72 L.J.P.C. 52; 87 L.T. 532.

APPEAL by the plaintiffs from a judgment of STABLE, J., sitting at the Liverpool Assizes, dated Oct. 29, 1940, and reported [1940] 4 All E.R. 330, where the facts are fully set out.

E. G. Hemmerde, K.C., and *Allister M. Hamilton* for the appellants.

G. J. Lynskey, K.C., and *J. M. Kennan* for the first respondents.

F. A. Sellers, K.C., and *A. E. Baucher* for the second respondents.

SIR WILFRID GREENE, M.R.: I will deal first of all with the appeal so far as it concerns the first respondents, De Luxe Car Services. The judge found that the driver of the car was driving with skill and care, and that he carried out an ordinary, simple and perfectly normal manoeuvre. With reference to that finding, it is said that the circumstance that the car knocked over three boys on bicycles and damaged a garage, if unexplained, is sufficient evidence of negligence on the part of the driver. I will assume the correctness of that proposition, but we are not concerned here with questions of burden of proof. We are concerned to see whether the finding of the judge, upon the whole of the facts before him, that the driver was not guilty of negligence is one which ought not to be allowed A to stand.

The explanation of the fact that this motor car found itself in a place where it ought not to have been was that a skid had taken place, and, further, that the skid was not due to any negligence on the part of the driver. That explanation the judge accepted as true in fact, and, if B that finding stands, there is an end of the case as against the first defendants. I do not find myself assisted by considering the meaning of the phrase " inevitable accident." I prefer to put the problem in a more simple way—namely, has it been established that the driver of the car was guilty of negligence ? It seems to me, not only that there was C ample evidence to support the judge's finding, but also that that finding was the correct finding, in view of the evidence which was given.

Counsel for the plaintiffs quite rightly called attention to the fact that the road was in a condition which required the exercise of care, and it was in that condition to the knowledge of the driver of the car, but it is not D right to say that, because the road was known to be in a dangerous condition, and because an accident took place, it follows that the driver must have been negligent. The degree of care which is called for from a driver depends upon the circumstances of the case. A driver who is proceeding along a piece of road which he knows to be slippery has E imposed upon him the burden of driving with an extra degree of care. Certain manoeuvres upon such a road would no doubt be dangerous, and any prudent driver would know that they were dangerous. A sudden alteration of direction, a sudden application of brakes, driving in such a way that one or other of those two manoeuvres might suddenly become F necessary, are all things which the prudent driver must avoid, but, if a driver upon a road which he knows to be slippery is driving with that measure of care which, in ordinary circumstances, would be perfectly safe upon such a road, he is not to be found guilty of negligence because, for some reason or another, an accident takes place owing to a skid. G

The driver in the present case, driving at a perfectly proper speed on a straight line and at a steady pace—because his actual acceleration had finished, and he was driving, as he says, at a steady acceleration, that is to say, his pressure upon the accelerator pedal was steady—suddenly found himself involved in a skid. It seems to me that there was H nothing in the manoeuvre which he executed which a prudent driver would not have thought it perfectly proper and safe to execute, notwithstanding the condition of the road. In those circumstances, it seems to me that the finding of the judge was not only justifiable, but right. In the result, therefore, the appeal, so far as it concerns the first respondents, must be dismissed.

I now come to deal with the case of the second respondents, the Birkenhead Corporation. That corporation acquired a tramway undertaking which, we are told, had previously belonged to a limited company which had obtained the right to lay the tramway and run the undertaking. It is not disputed that the provisions of the Tramways Act, 1870, apply to the Birkenhead Corporation in relation to this tramway unless, in the events which have happened, the obligations laid upon undertakers by that Act have ceased to apply. It appears that the tramway in question has not been used since 1932. Taking the position as at the date when the tramway was still a going concern in the hands of the Birkenhead Corporation, I think that there can be no question—and, indeed, the contrary is not suggested—that the obligation of the corporation, as the holder of the tramway franchise in relation to the maintenance and repair of part of the roadway, was the obligation imposed by the first sentence of the Tramways Act, 1870, s. 28. Here I must deal with a point raised by counsel for the second defendants—indeed, it was the first point he raised—when he said that considerations of that kind are beside the point, because it is not established in this case that the skid which was the cause of the accident was due to any defect in the surface of the roadway within the borough of Birkenhead. That suggestion is a new one in this court. The statements of claim in terms alleged that these matters took place within the borough of Birkenhead, and there is no specific traverse of that allegation, nor can I find, from beginning to end of the transcript of the shorthand note, any suggestion put to any witness that the actual skid which caused the accident began and was caused by something outside the limits of the borough. In my opinion, it is not proper to allow a case of fact of that kind to be raised in this court, and, therefore, I say no more about it.

The substantial arguments raised on behalf of the corporation relate to the true construction of the Tramways Act, 1870, s. 28. The first sentence of that section is as follows:

> The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than 4 ft. from each other) the portion of the road between the tramways, and in every case so much of the road as extends 1 ft. 6 ins. beyond the rails of and on each side of any such tramway.

Although there is no specific finding on the matter, the case proceeded on the footing that the skid in question took place within the area with regard to which the promoters are placed under a liability by that sentence. The finding of the judge was to the effect that the skid was caused by the dangerous condition of the road. Indeed, it is not surprising that, having found that, notwithstanding the propriety of the manoeuvre executed by the driver and the care with which it was carried out, a skid took place, he should proceed to find that the road surface was dangerous, because skids of that kind do not take place in such circumstances unless there is something the matter with the road. However, his finding is quite specific. He says, at p. 333:

> In my judgment, the surface of the road was treacherous and dangerous, because, in the course of time, these granite setts had become highly polished, and presented a surface which was certainly dangerous for a motorist. . . . A

There was ample evidence to support that finding. It is perfectly true that the case for the plaintiffs was conducted on certain alternative suggestions. The asphalt put into the rails, either alone or in combination with the state of the setts, was one suggestion, and there were others, but this was part of the plaintiffs' case. It is amply covered by the B pleadings, and there is evidence to support the finding. I can find nothing in the evidence to justify me in differing from that conclusion of fact of the judge, and the question must, therefore, be approached upon the basis that that finding stands.

On that basis, counsel for the corporation said, in the first place, that C that finding does not constitute a finding to the effect that the road was not maintained in a way sufficient to satisfy the first sentence of sect. 28. The mere fact that the setts had become shiny and slippery was not by itself, he said, a matter of improper maintenance or disrepair. With regard to that, I need say no more than that a precisely similar state of D affairs was considered in *Dublin United Tramways Co.* v. *Fitzgerald* (1), an appeal from Ireland decided in the House of Lords. As far as the condition of the setts is concerned, that case appears to me to be on all fours with the present case. In my judgment, the judge's finding is a perfectly proper finding to the effect that the roadway was not maintained E in such a way as to satisfy the first part of sect. 28.

Then it is said that there can be no liability on the promoters under that part of the section unless and until the road authority indicate that they are dissatisfied with the state of maintenance and repair of that part of the roadway for which the promoters are responsible. In my F judgment, that is a misconstruction of the section. If that construction were right, the result, in the present case, would indeed be curious. In considering the construction of the section, it is worth observing that the Act contemplates, and makes provision for, the purchase of tramway undertakings by local authorities who, in the normal case, would also be G the road authority for the district. Where such a purchase takes place, under sect. 43, the purchasing authority is to be deemed to be the promoter. Accordingly, where such a thing has happened, if the argument of counsel for the second defendants is right, sect. 28, in its application to such a state of facts, and taking the name of the present corporation H to illustrate the point, would run like this: "The Birkenhead Corporation shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the Birkenhead Corporation shall direct and to the satisfaction of the Birkenhead Corporation. . . ." If the argument is right, all that the corporation would have to do in order to avoid the responsibility put upon promoters of tramway undertakings by the Act would be to refrain, as the road authority, from issuing to itself, as the owner of the tramway undertaking, the necessary direction. In other words, the local authority acquiring a tramway undertaking would be able to put itself in the happy position that, in respect of that part of the roadway for which the undertaking is responsible, it could never be liable for non-feasance. That seems to me to be a reason for thinking that the construction suggested by counsel for the second defendants is not the right one.

In my opinion, however, the question is concluded by authority—namely, *Dublin United Tramways Co.* v. *Fitzgerald* (1). It is perfectly true that in that case the local authority had required the tramway company to take precautions to deal with the slippery state of the setts by placing sand upon them, or by some other reasonable and proper method, but I do not find in the opinions in that case any indication that that requisition by the road authority was in any sense a condition precedent to the liability of the tramway company. On the contrary, the language of the noble and learned lords concerned in that case appears to me to negative any such proposition. LORD HALSBURY, for instance, says, at p. 105 :

> The obligation, as I read the statute, is to keep that portion of the highway in a fit and proper condition for public traffic.

Then LORD DAVEY says, at p. 107 :

> What then was the duty of the tramway company when the granite setts had become in this state ? They must keep this roadway " in good condition and repair," and if the roadway as originally constructed had by the wearing of the traffic or by any other cause been brought into such a state as to become slippery and dangerous to horses passing over it, it is clear that their obligation was not fulfilled of keeping it in a good condition. Their duty then was to restore it to a good condition.

Indeed, to construe the sentence in the way in which counsel for the second defendants would have us construe it appears to me to cut down the liability of the tramway company, which, after all, has placed upon the highway what, but for the statute, would be a nuisance to a degree which, in many cases, might be a grievous injury to the public interest, and would be particularly ridiculous in a case where the authority acquiring the tramway was itself the road authority. In my opinion, therefore, that point fails.

The remaining point taken by counsel for the second defendants—and this point commended itself to the judge—was of this nature. He said that the first sentence of sect. 28 did not apply to the facts of this case at all, for the reason that in 1932 the tramway was abandoned, and has been ever since. In fact, what has happened is that the rails have been left in position, the granite setts between the rails and on each side of them have been left, and the grooves in the rails have been filled up with some bituminous substance. The argument in effect is that the promoters of a tramway can divest themselves of an obligation with regard to maintenance under the first part of sect. 28 merely by discontinuing the running of their trams. That appears to me to be a proposition which it is quite impossible to support. The holder of a tramway franchise, conferred upon him by statute, cannot divest himself of the responsibilities which that franchise carries merely by ceasing to avail himself of it. If that were so, the owner of this franchise, which entitles him to place upon the highway what would otherwise be a A nuisance could desert the works he had constructed there at any moment he pleased and get rid of the liability which was imposed upon him when he was empowered by the legislature to execute those works.

In the present case, counsel for the second defendants admitted that the corporation still have the statutory status of promoters within the B meaning of sect. 28. Their franchise, he agrees, still exists. They have never been deprived of it, and again he agrees that, if the corporation so chose, they could run trams tomorrow along those tracks, after they had taken the necessary steps to remove the bitumen which they have placed in the grooves. In other words, they are still, admittedly, pro- C moters of this tramway undertaking, although they have not exercised their franchise with regard to the running of trams since 1932, but they still exercise their franchise in an important respect. That is to say, they are maintaining on the public highway rails which the franchise entitled them to place there. Accordingly, when I re-examine, without re-reading, D the language of the first sentence of sect. 28, I find that it applies with perfect accuracy to the present state of facts. The Birkenhead Corporation are still the promoters. The tramway, which means the track, belongs to them, and I can see nothing, either in that sentence or in any other part of the Act, which, once those facts exist, can divest them of the E consequential liability of repairing and maintaining the part of the roadway referred to.

In my opinion, the judge was wrong in holding that this part of the section did not apply to the present case. He held that the part which did apply was the second sentence of sect. 28, which is as follows : F

> If the promoters abandon their undertaking, or any part of the same, and take up any tramway or any part of any tramway belonging to them, they shall with all convenient speed . . . fill in the ground and make good the surface and, to the satisfaction of the road authority, restore the portion of the road upon which such tramway was laid to as good a condition as that in which it was before such tramway was laid thereon.

G As the foundation for the judge's ruling that the provision applied to the present case, he found as a fact that the promoters, the Birkenhead Corporation, had abandoned their undertaking or part of it and had taken up the tramway or part of it. In my opinion, that finding of fact, so far as taking up the tramway is concerned, is not justified. The judge said, at pp. 334, 335 : H

> It is quite true that they have not pulled up the rails, but everything else connected with the tramways disappeared. The standards, and so on, for bringing the current to the trams, the tram stops, and all the other apparatus of a tramway have been completely obliterated. . . .

The standards, in fact, are still there, although they are used for electric light, and not for overhead power cables ; but it seems to me that he has misconstrued the word "tramway" in this sentence, because, in my judgment, that word applies to the actual track. The obligation which is imposed is the obligation to make good the surface after removal of the tramway. They are to restore that portion of the road upon which the tramway was laid. In my opinion, it is not possible to say that the promoters have taken up this tramway or any part of it. That being so, this part of the section does not apply to the case.

That, I think, really covers all the arguments which were put forward by counsel for the second defendants. He said, as a reason for thinking that his submissions were right, that it would be a dreadful thing if this local authority were placed under an obligation to deal with the road in accordance with the language of the Tramways Act, 1870, when it had abandoned the use of its tramway for so many years. I am afraid that that is an argument which does not appear to me to carry any weight at all. It is not an argument which one would have expected the Birkenhead Corporation to have put forward if the tramway had still belonged to the company which originally owned it and that company had discontinued running its trams and left the portion of the roadway in which the rails are laid to look after itself. In those circumstances, I can see the Birkenhead Corporation most anxious to see that the tramway company was held to its statutory obligation. If the corporation chooses to leave this track in the road, and to leave it in such circumstances that its use can be resumed, and takes no step to divest itself of its franchise, I can see no hardship whatsoever in the corporation being left under the liability imposed by sect. 28 on promoters who maintain in the public roadway what, but for the statute, would be a nuisance. If they wish to get rid of those obligations, it is perfectly simple for them to do so. They can abandon the undertaking and take up the tramway. The only obligation under which they then fall is to make good the surface. Once they have done that, their obligations in respect of the roadway as promoters of the tramway undertaking necessarily come to an end, and thereafter their only obligation will be that of a road authority, and they will not be liable for mere non-feasance. If they choose to maintain the physical track in the road in such circumstances as these, it seems to me that they have no good ground for complaint if the obligation which is imposed upon the promoters of the tramway is held to continue against them. In the result, therefore, this appeal succeeds against the Birkenhead Corporation.

Scott, L.J.: I agree.

Goddard, L.J.: I agree.

Appeal against the first respondents dismissed; appeal against second respondents allowed.

Solicitors: *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the appellants); *Mayo, Elder & Co.*, agents for *Rutherfords*, Liverpool (for the first respondents); *Ranger, Burton and Frost*, agents for *G. F. Lees & Son*, Birkenhead (for the second respondents).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

DIAMOND *v.* MINTER AND OTHERS.

[King's Bench Division (Cassels, J.), **February 11, 12, 13, 14, 17, 18, 19, 20, 25, 1941.**]

Extradition and Fugitive Offenders—Arrest—Necessity for indorsed or provisional warrant—Fugitive Offenders Act, 1881 (*c.* 69), *s.* 2.

The plaintiff, an Australian, on his arrival in England from Sydney was arrested by two of the defendants, who were police officers, and subsequently charged and detained by the third defendant, who was a detective-inspector. The defendants acted upon the mistaken belief that the plaintiff was one, F., who was alleged to have been guilty of conspiracy to defraud in New South Wales and for whose arrest a warrant had been issued. In this action for false imprisonment, the defendants contended that they had reasonable grounds for believing that an offence, which would have been a felony if committed in England, had been committed and that the plaintiff had committed it:—

Held: the apprehension of a fugitive offender is now governed by the Fugitive Offenders Act, 1881, s. 2, and can only be effected where there is an indorsed or a provisional warrant. The warrant for the arrest of F. was no justification for the arrest of the plaintiff, and reasonable grounds for believing that an offence had been committed out of England which if committed in England, would be a felony, and that the plaintiff had committed that offence, were no defence to this action.

[**EDITORIAL NOTE.** The defence in this case is based upon a dictum of Brett L.J., in *R.* v. *Weil* (6). This dictum has been the subject of some observations by textbook writers and was not followed by the High Court of Australia in *Brown* v. *Lizars* (8). It is here disapproved and the matter is stated to be wholly regulated by the statute. The arrest of a fugitive offender can only be justified by proof of an indorsed or a provisional warrant for the detention of the person actually detained.

As to Arrest of Fugitive Offenders, see HALSBURY, Hailsham Edn., Vol. 14, pp. 543-545, paras. 1044-1048; and for Cases, see DIGEST, Vol. 24, pp. 890-893, Nos. 150-161.]

Cases referred to :

(1) *Hoye* v. *Bush* (1840), 1 Man. & G. 775 ; 14 Digest 187; *1673*, 10 L.J.M.C. 168.

(2) *Beckwith* v. *Philby* (1827), 6 B. & C. 635 ; 14 Digest 177, *1544* ; 5 L.J.O.S.M.C. 132.

(3) *Davis* v. *Russell* (1829), 5 Bing. 354 ; 14 Digest 179 ; *1570*, 7 L.J.O.S.M.C. 52.

(4) *Walters* v. *Smith (W. H.) & Son, Ltd.*, [1914] 1 K.B. 595 ; 14 Digest 177, *1549* ; 83 L.J.K.B. 335 ; 110 L.T. 345.

(5) *McArdle* v. *Egan* (1934), 150 L.T. 412 ; Digest Supp.

(6) *R.* v. *Weil* (1882), 9 Q.B.D. 701 ; 14 Digest 178, *1562* ; 53 L.J.M.C. 74 ; 47 L.T. 630.

(7) *Mure* v. *Kaye* (1811), 4 Taunt. 34 ; 14 Digest 177, *1554*.

(8) *Brown* v. *Lizars*, [1905] 2 C.L.R. 837 ; 14 Digest 178, case *1562*.

(9) *Walker* v. *Baird*, [1892] A.C. 491 ; 11 Digest 542, *469* ; 61 L.J.P.C. 92 ; 67 L.T. 513.

(10) *Commonwealth* v. *Deacon*, 10 Sergeant and Rawle (Pennsylvania) 125.

(11) *Mackalley's Case* (1611), 9 Co. Rep. 61 b ; 14 Digest 313, *3288*.

(12) *R.* v. *Howarth* (1828), 1 Mood. C.C. 207 ; 14 Digest 172, *1498*.

(13) *Fisher* v. *Oldham Corpn.*, [1930] 2 K.B. 364 ; Digest Supp. ; 99 L.J.K.B. 569 ; 143 L.T. 281.

(14) *Harnett* v. *Bond*, [1925] A.C. 669 ; 33 Digest 268, *1869* ; 94 L.J.K.B. 569 ; 133 L.T. 482 ; *affg.*, [1924] 2 K.B. 517.

ACTION for damages for false imprisonment. The facts are fully set out in the judgment.

Valentine Holmes for the plaintiff.

Geoffrey Howard for the defendants.

CASSELS, J. : The plaintiff, a well-known citizen of New South Wales, left Sydney on Feb. 18, 1939, for the purpose of making a long stay in England. He arrived at Croydon by air from Paris on Friday, Mar. 31, and went to an hotel in London. He had been in his bedroom only a few minutes when two of the defendants, Miller and Campbell, metropolitan police officers, arrested him, honestly believing him to be one John Woolcott Forbes, who was a fugitive offender and said to be wanted by the New South Wales police for forgery and conspiracy to defraud. These two defendants took the plaintiff to Bow Street police station, where the other defendant, Minter, a detective-inspector of the metropolitan police force, further detained him and charged him as a fugitive offender on a warrant with conspiracy to defraud in New South Wales. The plaintiff was taken that afternoon before the chief magistrate at Bow Street Police Court, and was remanded in custody for 6 days. On Monday, Apr. 3, he was again brought before the chief magistrate. It was clear then from the evidence which the plaintiff called, and from the fingerprints of Forbes, which the police had obtained from New South Wales, that a mistake had been made, and that the plaintiff was not Forbes, and the plaintiff was at once released.

The plaintiff brings this action for damages for false imprisonment against all three metropolitan police officers. By their defence, the defendants first pleaded that they had a warrant, and relied on the Constables Protection Act, 1750, which provides a defence for constables who arrest a person on a warrant. It is true that there was a warrant, but it was a warrant to arrest John Woolcott Forbes for conspiracy to defraud. The defendants arrested and detained the wrong man, and they were not, therefore, within the protection of that Act of Parliament. Indeed, counsel for the defendants abandoned this defence. There is authority against it (*Hoye* v. *Bush* (1)), and, even without authority, I think that it would be difficult to justify the arrest of one person by producing a warrant for the arrest of another, however honest the intention of the police officers arresting might be.

The next plea, as amended, was that the defendants had reasonable and probable cause for suspecting (i) that John Woolcott Forbes had done out of England that which, if done in England, would amount to the felony of forgery, and (ii) that the plaintiff and Forbes were both the same person. A further plea was that the defendants at the time had reasonable and probable cause for suspecting that the plaintiff, without lawful authority, was using, or had in his possession, an irregular passport, contrary to the Aliens Order, 1920. Counsel for the defendants also abandoned this last defence.

Thus the case was left in this position. The plaintiff alleged that he had been falsely imprisoned, and the defendants, as constables, were pleading that they had reasonable and probable cause for suspecting that there had been committed out of England that which, if committed in England, would have been a felony, and reasonable and probable cause for suspecting that the plaintiff was the person who had committed it.

The story as disclosed by the evidence is an unusual one. The case is important, for it involves the consideration of questions concerning, on the one hand, the liberty of the subject, which is not lightly to be interfered with, and, on the other hand, the discharge by the police of their duty and the actual extent of their powers. John Woolcott Forbes was very much in the public eye in Australia between 1936 and 1939. He was a prominent financier and a gambler. He contributed lavishly to charities, bought a bank, promoted companies, and had well-known people among his directors. He had the most luxurious home in all Australia, where he entertained on a great scale. He sent an Australian team to Bisley at his own expense, and he was reputed to have made £1,000,000 in twelve months. In Jan., 1939, however, he set sail on the Strathnaver from Sydney. He was flying from justice. He was wanted for conspiracy to defraud. From Sydney he landed at Bombay. The Attorney-General of New South Wales approved the prosecution. The magistrate at Sydney held that a *prima facie* case had been made out. Forbes was arrested at Bombay, and proceedings under the Fugitive Offenders Act, 1881, were begun. He was allowed bail pending the arrival of a police officer from Sydney with the depositions and the warrant for the purpose of escorting him back to Sydney if the Bombay authorities should make an order for his extradition. However, when the police officer arrived at Bombay, Forbes had broken his bail and absconded.

What was the plaintiff's part in this ? The plaintiff's evidence—and I accept it on this—was that he had never been associated in any business transactions with Forbes. He knew Forbes, but only casually. He had been entertained by Forbes very lavishly on many occasions, but, said the plaintiff, so had many other prominent men in New South Wales. The plaintiff himself, according to his own account, is a man of no small importance in that dominion. He is a director of companies, prominent in the social life of Sydney, president of the Unemployment Relief Fund, vice-president of the Ratepayers' Association, an executive member of the council of the Citizens' Reform Association, and an unsuccessful candidate for the Federal Parliament and for the Upper House of New South Wales. He was born in Sydney, is 36 years of age, and well-known to members of the government in New South Wales and in commercial circles. It is not surprising, therefore, that, when he set sail from Sydney on his visit to this country on Feb. 18, 1939, he should carry with him letters of introduction and recommendation from the Prime Minister of Australia, Mr. Lyons, who was a great personal friend, from the Premier of New South Wales, from the Lord Mayor of Sydney, from Cabinet Ministers, and from leading men in the commercial world.

On Mar. 10, the plaintiff went ashore at Bombay with friends in accordance with the usual habit of long-distance travellers when the ship stays in port for a few hours. He went to an hotel, and a voice said: "Dick Diamond, what on earth are you doing here?" The plaintiff turned round, and there was John Woolcott Forbes. They exchanged a few words. Forbes arranged to visit the ship before she sailed the next day and did so. The plaintiff entertained Forbes with several other friends in his cabin, and he had occasion to change his coat, for the weather was very warm. He placed on his dressing-table his wallet, containing money and his passport, which is a very necessary document for a passenger voyaging from Sydney to London, for it has to be used on every occasion when the passenger leaves the ship at places of call. When Forbes had gone ashore and the ship was continuing her voyage, the plaintiff discovered that his wallet and passport had gone, but he thought that he had lost them on board the ship. According to the plaintiff's evidence, notices were posted on the ship about the loss of the passport, and he suffered much inconvenience at places where the ship called. The plaintiff never suspected Forbes. He had asked Forbes about "the trouble," and Forbes had told him that the charge was to be dropped and the case had been adjourned till Mar. 18. He asked the plaintiff to see Mrs. Forbes when he got to London, as Mrs. Forbes was there on account of her health, and this the plaintiff was willing to do.

As the boat was nearing Marseilles, the plaintiff received a telegram: "Will meet you Hotel Splendide. Dad." The plaintiff says that he was mystified, for he believed his father to be in Australia. He went to the Hotel Splendide with a passenger friend, and, to his great surprise, in walked Forbes. "Did you get out of your case on Mar. 18?" asked the plaintiff. "No," replied Forbes, "it has been postponed to the end of the month. Have you received your passport back ?" "How did you know that my passport was lost ?" asked the plaintiff, and Forbes then confessed that, when he was in the plaintiff's cabin on Mar. 11, he had seen the passport, the temptation was too great for him and he had taken it, and now he had sent it back to the ship with a note. The plaintiff was surprised and disgusted. Forbes said that he had not broken bail, and that he still had ample time to return. He had come to Marseilles to see someone in connection with his case, and he said that he expected the charges to be withdrawn. The plaintiff said that he would have to report the circumstances about his passport to Australia House when he reached London. On the ship he found his passport, the return of which enabled him to travel overland to Paris, and for a sleeping berth he used a return ticket and reservation which Forbes had. The plaintiff carried a letter from Forbes to Mrs. Forbes, and said that he purposely avoided Forbes at Marseilles. He strongly denied that Forbes travelled to Paris with him. From Paris, the plaintiff went to London for the day, returning the same night, and on Mar. 31 he flew to Croydon Airport.

In the meantime, the police of Bombay and Sydney had been busy. On Mar. 27, Scotland Yard received the first cable from Bombay as follows :

> John Woolcott Forbes, Australian, aged about 40 years, height 5 ft. 8 ins., stout, strong build, red face, fair hair, slightly bald, eyes blue, may have a moustache. Wanted for conspiracy, forgery and cheating, in Sydney. Arrested at Bombay, broke bail and absconded. Suspected left by air. His wife's address is . . . and may visit . . . Warrant under Fugitive Offenders Act and proceedings with Bombay police. If traced, arrest and inform.

The description in most details would fit the plaintiff on a casual inspection, although in fact his hair is dark. On Mar. 31, Scotland Yard received two cablegrams. One from the Bombay police was as follows :

> John Woolcott Forbes, alias Schmidt, left by Dutch air mail for London on Mar. 19 under name of Diamond, with Passport 208,818, issued Sydney, Feb. 10, 1939. Arrest and inform.

The other was from the Sydney police, stating that the return of John Woolcott Forbes to Sydney was earnestly desired on various charges of conspiracy to defraud, and continued :

> Warrant issued here for his arrest. Attorney-General approved of prosecution, and learning that Forbes left New South Wales on Strathnaver, the Bombay police were requested to arrest on arrival there with view to his return to Sydney. Proceedings under the Fugitive Offenders Act taken here, magistrate held *prima facie* case made out, and Detective-sergeant Nye proceeded Bombay with warrant and depositions to escort Forbes, and Forbes absconded bail whilst extradition proceedings pending. If arrested England, should be well held.

Then there is an address given, and the cablegram continues as follows :

> Cable advising result action taken. Carrying passport 208,818, name Diamond, issued Sydney 10th ultimo.

The particulars of the passport were, indeed, the accurate particulars of the plaintiff's passport. Chief-inspector Hatherill of Scotland Yard, received these cablegrams, and ports in England were informed. At 12.50 p.m. on Mar. 31, a message was received that a man travelling with passport 208,818 in the name of Diamond had arrived at Croydon by air from Paris, and was on his way to the Dorchester Hotel. Detective-sergeant Miller and Detective-sergeant Campbell, two of the defendants, were detailed to contact this man and follow him. Sergeant Miller was given details. The man he was to contact was Forbes, alias Diamond, wanted in Australia for forgery and conspiracy to defraud and jumping his bail. He was given a description of the man and was given the number of the passport he was carrying. At 2.30 p.m., Detective-inspector Minter, the other defendant, went before the Bow Street magistrate, showed him the cablegram from Sydney which said that Forbes was wanted for conspiracy to defraud, and obtained a warrant for the arrest of Forbes under the Fugitive Offenders Act, 1881, for that offence. It is to be observed that the warrant was not for the arrest of Forbes for forgery, and, further, that it was not for the arrest of Forbes, alias Diamond, or for Diamond, alias Forbes. It was for the arrest of John Woolcott Forbes for conspiracy to defraud within the jurisdiction of New South Wales.

Miller and Campbell did their work well. They contacted the plaintiff, followed him from the Dorchester Hotel to the Union Bank and Australia House, and saw him register and establish himself in the Waverley Hotel. Then Miller telephoned to Chief-inspector Hatherill and received the information that a warrant had been granted for the man's arrest (but Miller did not know for what the warrant had been granted), that this man, believed to be John Woolcott Forbes, was wanted in Sydney for forgery and conspiracy to defraud, that he had fled, that he had been arrested at Bombay, that he had been released on bail and absconded, and that Scotland Yard had received a request from the Sydney police to arrest him. That was Miller's information. Miller did not tell Campbell what the information was. The plaintiff had just got into his bedroom at the Waverley Hotel, with one Nederman, an American citizen of official standing, who had voyaged with him all the way from Sydney, when in walked the two police officers. The plaintiff's account of what happened and the two defendants' accounts of what happened were somewhat in conflict. The plaintiff said that the two officers said that they were from Scotland Yard and had a warrant for the plaintiff's arrest. The plaintiff said: "There must be some mistake. I have just arrived from France. I have not been in England for more than an hour or so." The police officers said that they knew all about his movements, having followed him. The plaintiff asked: "What is it all about?" The officers said: "We have instructions to arrest and bring you to Bow Street." The plaintiff asked what he was supposed to have done, but the police could not tell him. The plaintiff asked if they had a warrant, and they replied that it was being made out at Bow Street. The plaintiff said that the officers took possession of his brief case and of a letter which he was reading at the time. The plaintiff produced his passport when the officers asked for it, and of course it tallied with the number they had and the particulars. According to the plaintiff, the name of Forbes was never mentioned. He was pushed into the lift, and was taken to Bow Street police station in the police car.

The officers' account differs. According to them, they asked his name, and, when he said "Diamond," Miller, who carried on all the conversation, said, "I have reason to believe that your name is Forbes," and asked for A the passport, which was lying on the bed. Miller took the plaintiff to be a man named Forbes, alias Diamond, for the arrest of whom a provisional warrant, he believed, had been granted. He believed the man to be the one wanted for the offences, of which he had been told, including forgery, and added that there was no pushing. On the way to the police station, B the plaintiff tried to get rid of the letter which Forbes had given to him to take to Mrs. Forbes, but the police officer secured it. When read afterwards, it was found to contain references to the usefulness of the plaintiff, although Forbes regarded him as an awful bore. At Bow Street police station, the plaintiff said that he was detained for an hour-and-a- C half while the police were looking for a magistrate. The officers put the time at much less. The defendant Minter asked him his name. The plaintiff said: "Hyman Richard Diamond." The officer said: "I have reason to believe that your name is John Woolcott Forbes. I hold a provisional warrant for your arrest for conspiracy to defraud, committed D in the jurisdiction of New South Wales." Then he read the warrant to him. The plaintiff protested that he was not John Woolcott Forbes. When he was charged, he did the same. He was taken to the police court next door, and there came before SIR ROLLO GRAHAM-CAMPBELL. The plaintiff pleaded not guilty, and still protested that he was Diamond, E not Forbes. The defendant Minter gave evidence, and the defendant Miller gave evidence about the passport, which the magistrate examined and found to bear the same number as that mentioned in the cablegram from Sydney. The magistrate then said: "In my opinion, there is sufficient evidence before me to justify my remanding you for one week." F The plaintiff thought that he was going to walk out of the court, but, when he discovered that he could not do that, he asked for bail, which the police opposed, and the plaintiff went to Brixton Prison. His friend Nederman, who had difficulty in finding Bow Street Police Station, communicated with a solicitor who happened to be an Australian who knew the plaintiff G well, and this solicitor got into touch with Inspector Minter on the Sunday, and arranged for an application for bail to be made on the Monday at Bow Street. This solicitor could bring strong force to bear on the situation. There were Australians who knew the plaintiff to be Diamond. There were others who knew both the plaintiff and Forbes. H Inspector Minter was not idle. He cabled to Sydney for Forbes' fingerprints, which arrived on the Monday. The case was put back in order that the plaintiff's fingerprints could be taken, but when they were taken, they were found to be different from Forbes'. At 2 p.m. on the Monday, when the matter again came before the chief magistrate, Inspector Minter went into the witness-box and said that he was satisfied that the plaintiff was not Forbes. Counsel for the plaintiff, according to the inspector—though the plaintiff denied that he had given instructions for it to be said—observed that the plaintiff appreciated that he was himself partly to blame for the predicament in which he found himself, and that no blame could be attached to the police. The magistrate said that he did not think that the police could have acted otherwise than as they did. That same afternoon, the plaintiff attended at Inspector Minter's office to get his property, and, according to that officer, said that he had brought the whole thing upon himself, and that he did not blame the police in any way. The plaintiff denied this, and certainly it was not his attitude in this case, during which his indignation very largely contributed to his creating rather a bad impression upon the court.

One or two incidents led me to think that he was not very frank. He had kept a diary during the voyage, and, when the police arrested him, they took it and made extracts from it. There had been no contemporaneous entry in it of the alleged loss of the passport, but, when the plaintiff got it back from the police on Apr. 3, he made certain entries with regard to the incident, wording them and entering them so that they would appear as if they were written at the time. He had recorded his meeting with Forbes and also with Mrs. Forbes, but these he obliterated after he had got the diary back, and the infra-red ray subsequently displayed part of them. This was unfortunate, but it is only fair to the plaintiff to say that he did not produce the diary or make it part of his evidence. It was put in by the defendants. Wherever his evidence is in conflict with that of the police with regard to what happened at the time of his arrest and in the police court, I accept the evidence of the police and reject the plaintiff's, except that I am satisfied that the name of Forbes was not mentioned by Sergeant Miller when he arrested the plaintiff. Inspector Minter suggested that the plaintiff was in league with Forbes, and it was contended, on behalf of the defendants, that the plaintiff had deliberately lent his passport to Forbes in order that Forbes might escape, had thus helped an escaping criminal to hoodwink the police, and had paid a flying visit to London from Paris in order to purchase clothes and get money for Forbes. There was no evidence to support such an attack upon the character of the plaintiff, and I cannot help regretting that it was made.

The fact remains that, in arresting the plaintiff, the two defendants Miller and Campbell arrested the wrong man, and, in detaining the plaintiff at Bow Street police station, Inspector Minter detained the wrong man. The plaintiff has, therefore, been wrongfully arrested and falsely imprisoned. Can the defendants escape their liability ? I think that the period of detention which I have to consider is that period whilst the plaintiff was in the custody of the two defendants Miller and Campbell and whilst the plaintiff was at Bow Street Police Station before he went into the court. What happened after that with regard to his being remanded in custody was the result of a judicial act by the chief magistrate, and no liability can attach to the police officers for that. It was contended on behalf of the plaintiff that, as a result of what the defendants did, the magistrate remanded the plaintiff in custody under the impression that he was remanding Forbes. I do not accept that contention. The magistrate remanded the man before him, and that was the plaintiff.

There remains the liability of the defendants for false imprisonment up to that time. The defendants, finding that the statutory defence of the protection of the warrant did not avail them (*Hoye* v. *Bush* (1), at p. 786), put the warrant on one side, and sought refuge in the contention that they had in fact arrested and detained the plaintiff because they had reasonable ground to suspect that a felony had been committed, and that the plaintiff was the man who had committed it.

The defendants said that they had the word "forgery" in the cablegram from Bombay. That is true, but the kind of forgery was not stated. Forgery in this country which is not made felony by statute is a misdemeanour. Statutes have made many kinds of forgery felony (Archbold's Criminal Pleadings, 30th Edn., p. 813). However, there was nothing before the defendants as to the nature of this forgery, and such limited information as there was came, not from Sydney, New South Wales—the cablegram from there said "Serious charge, conspiracy to defraud"—but from Bombay, which was not the place seeking the return of Forbes. The defendants in fact had no other information, when they arrested and detained the plaintiff, as to the offence which he was supposed to have committed. Conspiracy to defraud is a misdemeanour. Assuming in favour of the defendants that they arrested the plaintiff because they had reasonable ground to suspect that a felony had been committed, and, further, reasonable ground to suspect that the plaintiff was the man who had committed it, then, if the suspected felony had been committed in this country, the common law is clearly stated in Bullen and Leake, 1868, p. 795:

> A constable is justified in arresting a person without a warrant upon a reasonable suspicion of a felony having been committed and of the person being guilty of it, although no felony has in fact been committed and whether the reasonable grounds for suspicion are matters within his own knowledge or are facts stated to him by another.

In very many cases this has been accepted as the common law: *Beckwith* v. *Philby* (2), *Davis* v. *Russell* (3), *Walters* v. *Smith* (*W. H.*) *& Son, Ltd.* (4), *per* Sir Rufus Isaacs, L.C.J., at p. 602, and *McArdle* v. *Egan* (5).

Then the defendants go further and say that they arrested the plaintiff for an offence committed abroad which, if committed in this country, would have been a felony, and seek to escape liability in that way. This contention is based upon a *dictum* of Brett, L.J., in *R.* v. *Weil* (6), at p. 706:

> I doubt much whether a policeman is not justified in arresting a man without a warrant on reasonable grounds of suspicion of his having done that which would be a felony if committed in this country.

This observation of BRETT, L.J., was the great foundation of the defendants in this case, and I have given it careful consideration. Indeed, counsel for the defendants went so far as to say that, if the *dictum* of BRETT, L.J., does not state the law relating to arrest by a constable, then the arrest in this case was unjustified, and the only question is one of damages.

Whether the plaintiff was actually arrested on a warrant because the defendants believed him to be Forbes or whether he was arrested because the defendants had reasonable ground for suspecting that he had done something out of England which, if done in England, would be a felony, it is quite clear that he was arrested as a fugitive offender. The apprehension to-day of fugitive offenders depends entirely upon the Fugitive Offenders Act, 1881. Sections 1 and 4 provide that a fugitive shall be liable to be apprehended and returned in manner provided by the Act, and that a fugitive may be so apprehended under an indorsed or a provisional warrant. A warrant to be indorsed would come from the dominion from which the fugitive had come, and where he was supposed to have committed the offence. A provisional warrant, which was the kind of warrant issued in this case, is issued by a magistrate on such information as would justify the issue of a warrant if the offence of which the fugitive is accused had been committed in the magistrate's jurisdiction. The power to arrest is purely statutory and it does not matter whether the offence is felony or misdemeanour. BRETT, L.J., uttered his *dictum* in *R.* v. *Weil* (6) in 1882 upon the Extradition Act, 1870, s. 8, which makes the same provisions with regard to fugitive offenders from foreign countries. The Fugitive Offenders Act, 1881, had come into operation nearly a year before he uttered his *dictum*. I can find no other authority for the proposition that a constable in this country can, without a warrant, arrest a person because he reasonably suspects him of having committed out of England an offence which would be a felony if it had been committed in England.

Counsel for the defendants referred to *Mure* v. *Kaye* (7), which was the case of an arrest in Scotland by a private person on suspicion of a felony in England. The case mainly turned on the insufficiency of the plea, but HEATH, J., said, at p. 43 :

> As to the first point, it has generally been understood, that wheresoever a crime has been committed, the criminal is punishable according to the *lex loci* of the country against the law of which the crime was committed, and by the comity of nations the country in which the criminal has been found has aided the police of the country against which the crime was committed in bringing the criminal to punishment. In LORD LOUGHBOROUGH's time the crew of a Dutch ship mastered the vessel and ran away with her, and brought her into Deal, and it was a question whether we could seize them and send them to Holland ; and it was held we might. And the same has always been the law of all civilised countries.

I do not know whether HEATH, J., meant by what he said that any constable without a warrant may arrest in England anybody suspected of felony abroad. It may be that he did. If so, STEPHENS' HISTORY OF THE CRIMINAL LAW, 3rd Edn., p. 66, has the following passage with regard to this case:

> This faint trace of evidence of any such power existing by the common law has been entirely superseded by subsequent legislation. *Mure* v. *Kaye* (7) was seventy years before the Fugitive Offenders Act, 1881.

With respect, I agree with Stephen, J., but I must deal with the *dictum* of Brett, L.J., because it was uttered after the Act came into force. It was criticised by Piggott on Extradition, 1910, p. 91:

> This seems to set at naught the fundamental principles on which extradition rests, because it denies the common law right to be at liberty if no offence against the law of England has been committed. The Extradition Act provides the only way in which that right may be broken in upon. Where the offence alleged has been committed against a foreign law, if there is no requisition by the foreign government, a person may only be arrested on warrant of apprehension issued by a magistrate or justice on sufficient evidence laid before him.

Moreover, Clarke on Extradition, 3rd Edn., p. 202, refers to this *dictum* of Brett, L.J., merely as "an intimation." In Biron and Chalmers on Extradition, p. 37, referring to *R.* v. *Weil* (6), the following passage occurs:

> In this case Brett, L.J., expressed an opinion that a policeman would be justified in arresting a fugitive criminal without a warrant on reasonable grounds of suspicion of his having done that which would be a felony if committed in this country, that is according to the laws of arrest in this country. The opinion is given somewhat tentatively, and the arrest without a warrant under this section should not take place save in the most urgent and exceptional circumstances, and a warrant should be obtained as quickly as possible afterwards.

In Halsbury's Laws of England, Hailsham Edn., Vol. 14, p. 529, the *dictum* is repeated, with the addition of the words "It seems." The *dictum* is similarly referred to in Clarke and Lindsell on Torts, 9th Edn., p. 734, and in the last edition of The Metropolitan Police Guide, but it is not referred to at all in Salmond on Torts, 9th Edn., nor in Russell on Crime, 9th Edn. In Oke's Magisterial Synopsis, 13th Edn. (1881), Vol. 2, p. 912, it is stated:

> By the common law a person who has committed a felony in any part of Her Majesty's dominions abroad or in a foreign country, whether he is a British subject or not, or whether we have an extradition treaty with such country or not, may be arrested here or in any part of Her Majesty's dominions without warrant and taken before a magistrate to be dealt with as the law authorises in the respective cases.

No authority whatever is cited for that proposition, and I cannot find that it was repeated in the next edition, published in 1893, where the provisions of the Fugitive Offenders Act, 1881, were set out.

The point came up for discussion and decision in the High Court of Australia in *Brown* v. *Lizars* (8). It is not without interest that in the plaintiff's own country of Australia there should be found a decision of the highest court in the land which is in his favour. It was an appeal from the Supreme Court of Victoria. Brown had been arrested by Police-constable Lizars in Victoria. The constable, having verbal information that Brown had told some other person that he had stolen money in South Africa, found in the Victoria Police Gazette the report of an embezzlement of £400 at Durban, Natal, and a description which fitted Brown, and arrested Brown on that charge of embezzlement, a felony. The magistrate discharged Brown, who brought an action for false imprisonment. A county court jury, in answer to questions put by the judge, found that the plaintiff had an honest belief in the truth of the statement he had received and had arrested Brown on suspicion of having committed a felony, and they gave a verdict for Brown, the plaintiff, for damages. The judge said that there was reasonable and probable cause, and entered judgment for the defendant, and refused a new trial. The Supreme Court of Victoria upheld the refusal, but, on appeal to the High Court of Australia, that court ordered a new trial, and held as follows:

> A reasonable suspicion that a person has, in a foreign country or in another part of the British dominions, committed an offence which, if committed in Victoria, would be a felony, does not justify a constable in arresting such person in Victoria without a warrant, and is therefore not a defence to an action by such person against the constable for false imprisonment.

In that case, Griffith, C.J., said, at p. 849:

> The contention on behalf of the defendant, the respondent to this appeal, is that a constable of police has the same right to arrest on suspicion of a felony committed in a foreign country, or at any rate in another part of the British dominions, as he has on suspicion of a felony committed in Victoria or another state of the Commonwealth. In support of that contention some ancient authorities—very respectable authorities—were cited, which would deserve great attention if there were no more to be said about the matter. In particular, reference was made to Chitty's Criminal Law and Oke's Magisterial Synopsis, which contain passages which warrant that contention. We had a very interesting argument before us with respect to the foundation of the law of extradition. There can be no doubt that it was assumed for many centuries that a sovereign state could extradite to another country a foreigner found within its territories for an offence committed within the other sovereign state. That power was frequently exercised.

Then he proceeded to go through the history of extradition, with a passing reference to the observation of Heath, J., in *Mure* v. *Kaye* (7), and, so far as that is concerned, he said, at p. 850:

> The case of *Mure* v. *Kaye* (7) in 1811 was after that treaty, but in it neither the treaty nor the statute was referred to. In the course of that case observations were made—particularly by Heath, J.—to the effect that a magistrate may probably issue a warrant for the arrest of a person charged with an offence committed in a foreign country.

I have looked at the report in 4 Taunt. 34, and I do not find that statement in the observations of Heath, J. Then Griffith, C.J., continued as follows, at p. 850:

> But in that case the question arose as to an offence committed in England by a person who had gone to Scotland and been arrested there. Those statements are, after all, mere *dicta*, and the case did not proceed upon that ground at all.

Later he said, at p. 851:

> In the face of the current of these authorities and of the course of legislation followed by the Extradition Acts and the Fugitive Offenders Acts, the former applying between Great Britain and foreign countries, and the latter between different parts of the British Empire, it is impossible to hold that the liberty of individuals can now be interfered with without the sanction of municipal law. In a case before the Privy Council, *Walker* v. *Baird* (9), it was contended that the Crown, having the power of making treaties, could, for the purpose of carrying out a treaty, sanction an interference with certain private rights without legislative enactment. The case was argued by the present Lord Alverstone, then Sir Richard Webster, Attorney-General, and Lord Herschell, in delivering the judgment of the court, said [p. 497]; "The learned Attorney-General, who argued the case before their Lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty.

> The proposition he contended for was a more limited one. The power of making treaties of peace is, as he truly said, vested by our constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace, that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law." In the face of those authorities there is nothing except the statement of a judge of the Court of Pennsylvania in *Commonwealth* v. *Deacon* (10) that it was the practice in the English colonies before there was any statute in the nature of the Fugitive Offenders Act for one colony to surrender fugitive offenders from another colony. It is unnecessary to examine the origin of such a practice, or to inquire whether the practice was ever objected to, or whether anything in the nature of extradition between British colonies ever existed apart from statute, in the face of the authorities to which we have been referred.

Then, the end of his judgment, he says :

> But, even if that proposition were true, it would by no means follow that any constable could set the law in motion—that this great prerogative power, supposed to be an incident of sovereignty, could be put in motion by any constable who thought he knew the law of a foreign country, and thought it desirable that a person whom he suspected of having offended against that law should be surrendered to that country to be punished. There is therefore no authority in support of the defence set up in answer to the plaintiff's claim. The result is that the learned judge of the county court ought to have granted a new trial, and that the Supreme Court should have allowed the appeal from his refusal to do so. The appeal must therefore be allowed.

Then Barton, J., another member of the court, in an illuminating judgment in which he made quotations from Clarke on Extradition and referred to the *dicta* of Heath, J., in *Mure* v. *Kaye* (7) as an unsafe guide, added, with regard to the case before the court, at p. 861 :

> It is not even asserted, much less proved, that the plaintiff's arrest took place in any such way as to entitle the defendant constable to the protection of the Fugitive Offenders Act, 1881. There has not been any warrant, and the claim to be justified in arresting without one is in itself an abandonment of the protection of the Act. It is unnecessary therefore to discuss the question whether the charge before the magistrate of an embezzlement committed in Natal, without any proof that it is punishable as prescribed in sect. 9, would enable the arresting constable to rely on that provision of the Act. It seems to me that the law in this respect qualifies the exercise of the prerogative to this extent, that apart from the exercise of the treaty making powers and legislation hereupon, which is a matter between the Empire and a foreign state, the statutory provisions which regulate municipally the arrest of foreign offenders, are the only provisions under which the defendant could have sought for justification, and he has not brought himself within them.

Then O'Connor, J., the other member of the court, said, at p. 866 :

> It is quite clear that a constable of this state cannot justify an arrest without warrant on the ground that he had a reasonable suspicion that the person arrested had committed a felony in South Africa. Mr. Robinson relied on several authorities, amongst them a passage in Oke's Magisterial Synopsis, which appeared to support his contention, but the modern authorities do not support that view, and it can no longer be taken as a correct statement of the law. The duty of arrest and surrender of fugitive offenders from other countries is, as pointed out in Clarke on Extradition, a matter of international duty, that is, a duty to be carried out by the Executive. Its origin is in the power of the Executive—the prerogative power, as it is called—in accordance with the comity of nations to surrender fugitives from justice to their own state. In modern times, no doubt, the executive government has always had conferred on it powers from Parliament to *regulate* the performance of that international duty. But it has never been decided that the power has been absolutely taken away from the executive government to exercise that prerogative right on fitting occasions. No doubt the tendency of modern times has been to regulate the right of arrest by statute as almost every other like power is regulated.

Later he said, at p. 868:

> This authority to arrest without warrant on suspicion of a felony which would justify an arrest in this state, can have no application where the offence is committed outside this state, whether in a foreign country or in some other British possession. There are many cases in which an arrest can be made for an offence committed in A another country, but then the ordinary course under the Fugitive Offenders Acts or the Extradition Acts must be followed. There is ample provision for carrying out these international agreements made between different British possessions or between the British Empire and foreign countries, in those Acts which provide a special procedure which must be followed. But these Acts, if they are applicable, have not been applied in this case, and on the principles of the common law I can see no justification whatever for this arrest.

B I read these judgments, or passages from them, with interest. I am not bound by them, but, with respect, I agree with them. I am unable, therefore, to act upon the *dictum* of BRETT, L.J., in *R.* v. *Weil* (6).

The Fugitive Offenders Act, 1881, has made provision for the course to be adopted in the arrest of fugitive offenders. Only upon either an C indorsed or a provisional warrant can they be lawfully arrested and detained. The whole matter of the arrest of fugitive offenders is, in my view, now regulated by statute. The defendants have no protection in law for the arrest of the plaintiff. If necessary, I should hold as a fact that they did not even arrest him or detain him because they thought he D had been guilty of that which, if committed in this country, would have been a felony. What they did was to arrest and detain him on the warrant, and that was not a warrant to arrest and detain him. It was a warrant to arrest and detain somebody else—namely, John Woolcott Forbes. When it was discovered that a mistake had been made, the E defendants sought refuge behind the one word "forgery," in the cablegram from Bombay. The plaintiff was not told that he was being arrested for forgery, and some authorities were cited to me to support the contention that that omission alone would make the arrest unlawful: *Mackalley's Case* (11), *R.* v. *Howarth* (12), and CLARKE AND LINDSELL ON F TORTS, p. 742. However, I do not decide upon that ground at all. An instance of mistaken identity in arrest is to be found in *Fisher* v. *Oldham Corpn.* (13), where, on a request from the Oldham police, a metropolitan police officer arrested one man in mistake for another and handed him over to an inspector of the Oldham police. The plaintiff there G sued the corporation, and it was held that the police were not the agents of the corporation, and the action therefore failed. The case is not in point here, beyond one thing—namely, it was there admitted by or on behalf of the plaintiff, for what it is worth, that there was a case of false imprisonment against an appropriate defendant (p. 366).

H I think that the defendants made an honest mistake, and I am satisfied that each of them thought that he was carrying out his duty. Although it has nothing to do with me, I cannot help expressing the hope that, though my judgment is against them, their careers in the metropolitan police force will not be affected thereby. I think, further, that much of the trouble might have been averted by a different attitude on the part of the plaintiff. He was doubtless indignant, and rightly so, but, if he had made clear at the very beginning that his passport had been stolen from him at Bombay by the real Forbes, I am satisfied that the defendants would immediately have caused inquiries to be made, which would have saved the plaintiff much of the inconvenience to which he was put. As it is, however, by this very full investigation, the plaintiff's character has been vindicated, and he can if he wishes, return to Australia and look his friends in the face. At the risk of being regarded as an awful bore, as Forbes is said to have described him, he will be able to tell the story of his stay for three days and nights in Brixton Prison, London, accommodation which money alone cannot command, though the want of it may sometimes lead there indirectly. The question of damages, therefore, arises. The plaintiff has been falsely arrested and detained from the time when he was taken into custody by the defendants Miller and Campbell until he stood before the chief magistrate at Bow Street Police Court. He was taken in a car from his hotel to Bow Street Police Station, and he spent some time there. For that I must award him damages. I do not award him damages for his subsequent detention in Brixton Prison, for that, as I have said, was the result of a judicial decision. The breaking of the chain of causation was dealt with by SCRUTTON, L.J., in *Harnett* v. *Bond* (14), at p. 565 :

> But it appears to me that when there comes in the chain the act of a person who is bound by law to decide a matter judicially and independently, the consequences of his decision are too remote from the original wrong which gave him a chance of deciding.

I think that a fair sum would be £110—£50 each against the defendants Minter and Miller, and £10 against the defendant Campbell, whose part in the affair was, after all, a very minor one. I therefore give judgment for the plaintiff for the sum of £110, divided as I have said.

Judgment for the plaintiff for £110 *damages with costs.*

Solicitors : *A. Kramer & Co.* (for the plaintiff) ; *Solicitor for the Metropolitan Police* (for the defendants).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

Re MYLNE, POTTER *v.* DOW.

[Chancery Division (Farwell, J.), **February 17, 1941.**]

Charities—Religious purposes—Gift to persons holding certain beliefs—Validity.

The testatrix gave part of her residuary estate to create a trust fund for the benefit of persons engaged in evangelistic work, including missionaries, active or retired, or such continuing Christian workers as her trustees might in their absolute discretion select, " but so that no person shall be eligible for any benefit under this trust unless he or she shall be a protestant in religion and a whole-hearted believer in the deity of Christ and the full inspiration of Scripture." The trustees issued a summons to determine, *inter alia*, whether the above was a valid charitable gift :—

Held : there was a valid charitable gift. Its terms did not operate by way of forfeiture, but were descriptive of the persons to be selected by the trustees as beneficiaries under the gift and the task of selection was not impossible of performance.

Re Blaiberg, Blaiberg v. De Andia Yrarrzaval (*Marquise*) (1) *distinguished.*

[**EDITORIAL NOTE.** It has been said that the test of the validity of a gift of this nature is that the court must at any time be able to say whether or not a particular person fulfils the conditions, and that this is in practice impossible where the condition relates to the state of mind of the legatee. However, the strictness of this rule is confined to conditions operating by way of forfeiture. Where the conditions are part of the description of the donees, it may be possible for the trustees to satisfy themselves from the acts of donees that they are persons sufficiently within the requirements of the gift.

As to Missionary Purposes, see HALSBURY, Hailsham Edn., Vol. 4, p. 119, para. 157; and for Cases, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160.]

Case referred to :

(1) *Re Blaiberg, Blaiberg* v. *De Andia Yrarrzaval* (*Marquise*), [1940] Ch. 385; [1940] 1 All E.R. 632; Digest Supp.

Adjourned Summons to determine, *inter alia*, whether the directions given by the testatrix, Jessy Louisa Mylne, in cl. 11 of her will constituted a valid charitable gift. The testatrix made her will on Feb. 29, 1940. She died on Mar. 3, 1940, and probate of her will was granted on June 5, 1940. The relevant portions of the will are set out in the judgment.

H. Rose for the plaintiffs, the executors.

Lindsay M. Jopling for the first defendant, a pecuniary legatee.

W. G. Hart for the second defendant, a pecuniary legatee.

M. Gravenor Hewins for the third and fourth defendants, the next of kin.

H. O. Danckwerts for the fifth defendant, the Attorney-General.

Farwell, J. : Clause 11 of the testatrix's will provided as follows :

> I direct that . . . my trustees shall apply the residue of my residuary trust fund (if any) and the income thereof for the benefit of such persons of either sex and who are or have been engaged in evangelistic work including retired missionaries or missionaries still engaged as such or continuing Christian workers of any other description as my trustees in their absolute discretion shall from time to time select and in such shares and proportions and such manner in all respects as my trustees in such discretion shall from time to time think fit. It is my wish but without imposing any trust that preference shall be given to such person as may

be residing in Guildford and the neighbouring district but so that no persons shall be eligible for any benefit under this trust unless he or she shall be a protestant in religion and a whole-hearted believer in the deity of Christ and the full inspiration of Scripture. . . ."

I have to consider whether this gift in cl. 11 constitutes a valid charitable trust. It has been suggested that it might be construed as a special power of appointment given to the trustees among such persons as they thought fit within the limitations of the will. However, it is not necessary for me to consider whether that is so, as I have come to the conclusion that the gift does create a good charitable gift, not as being for the relief of poverty, because there is not enough to show what degree of poverty is necessary, but as being for the advancement of religion. The fact that the gift includes retired missionaries may encourage other people to take up missionary work. A B

The conditions attached to this gift do, however, raise a very difficult question. The testatrix stated : C

> It is my wish but without imposing any trust that preference shall be given to such persons as may be residing in Guildford and the neighbouring district. . . .

She imposed no trust. She merely expressed a wish that persons residing in a particular neighbourhood should be preferred. Then the clause continues as follows :

> . . . no person shall be eligible for any benefit under this trust unless he or she shall be a protestant in religion and a whole-hearted believer in the deity of Christ and the full inspiration of Scripture. D

That seems to me not merely to indicate a wish, but to impose a condition. It has been said that the condition is one about which it is impossible for the trustees to be satisfied. I have been referred to the decision of MORTON, J., in *Re Blaiberg, Blaiberg* v. *De Andia Yrarrzaval (Marquise)* (1), following a decision of my own, in which it was held that a condition which stipulated that a child or grandchild of the testator would forfeit his interest if he married someone not of the Jewish faith was void for uncertainty. A condition by which a person forfeits an interest must be construed strictly. In that case it was impossible for the court to decide whether or not a person was "of the Jewish faith," that being a state of mind. In the present case, however, the persons to be benefited must be missionaries or retired missionaries, or "continuing Christian workers," and it seems to me not impossible for the trustees to discover whether they are giving effect to the wishes of the testatrix that a selected person should be "protestant in religion and a whole-hearted believer in the deity of Christ and the full inspiration of Scripture." In my judgment, it is possible for the trustees, by making inquiries, to ascertain whether a particular person is suitable. The condition may impose some difficulty on the trustees, but it is not one which it is impossible to fulfil. It differs from a forfeiture clause. It is merely a question of the trustees making a selection of a class of persons, and, so long as the trustees act honestly in this matter, and exercise this power fairly, no one can complain. If, for example, they select persons who are professed atheists, or some- E F G H thing similar, the Attorney-General may be moved to intervene. In my judgment, this does constitute a valid charitable gift. I will refer the matter to chambers to settle a scheme unless the executors decide forthwith to exercise the discretions given in the will.

A *Declaration that bequest in cl.* 11 *was a valid charitable bequest. Costs of all parties as between solicitor and client out of the estate.*

Solicitors: *Johnson, Weatherall, Sturt & Hardy*, agents for *Potter, Crundwell & Bridge*, Farnham (for the plaintiffs and for the first defendant); *Ford, Harris & Co.* (for the second defendant); *Rivington & Sons* B (for the third and fourth defendants); *Treasury Solicitor* (for the Attorney-General).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

CHADBURN *v.* CHADBURN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), **February 26, 1941.**]

F *Divorce—Judicial separation—Grounds for presentation of petition—Desertion—Period of desertion required by statute—" Might have been presented " —Matrimonial Causes Act*, 1937 (c. 57), *s.* 5 (1).

Under the Matrimonial Causes Act, 1937, s. 5 (1), a petition for judicial separation may be presented " on any grounds on which a petition for divorce might have been presented." It was contended that this might mean on any ground on which such a petition might have been G presented before the passing of the 1937 Act :—

HELD : the words in question relate solely to the grounds on which a petition for divorce can be presented under the 1937 Act.

[**EDITORIAL NOTE.** This decision appears to remove a doubt as to the position in respect of judicial separation founded on desertion. Before the passing of the H 1937 Act the necessary period of desertion was two years. The effect of the passing of that Act seems to have been to increase that period to three years. This increase may appear to be contrary to the trend of that legislation, but those who have had practical experience of petitions for judicial separation will not be sorry to see even so small an additional obstacle placed in the way of their successful prosecution.

AS TO GROUNDS FOR JUDICIAL SEPARATION, see HALSBURY, Hailsham Edn., Vol. 10, p. 649, para. 952; and FOR CASES, see DIGEST, Vol. 27, p. 376, Nos. 3639-3643.]

UNDEFENDED PETITION by the wife for judicial separation on the ground of desertion for 3 years and upwards immediately preceding the presentation of the petition. The report is concerned only with the construction of the relevant statutory provision.

Geoffrey C. Tyndale for the petitioner.

HODSON, J.: This is a petition for judicial separation on the ground of desertion for 3 years and upwards immediately preceding the presentation of the petition. The suit is brought under the Matrimonial Causes Act, 1937, s. 5 (1), which is a subsection substituted for the Supreme Court of Judicature (Consolidation) Act, 1925, 185 (1), (2). The right to a judicial separation on the ground of desertion without cause for not less than two years, which was first given by the Matrimonial Causes Act, 1857, and was contained in sect. 185 (1) of the Act of 1925, is thus taken away by the Act of 1937, and the substituted provision is as follows:

> A petition for judicial separation may be presented to the court either by the husband or the wife on any grounds on which a petition for divorce might have been presented, or on the ground of failure to comply with a decree for restitution of conjugal rights or on any ground on which a decree for divorce *a mensa et thoro* might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857, and the foregoing provisions of this part of this Act relating to the duty of the court on the presentation of a petition for divorce, and the circumstances in which such a petition shall or may be granted or dismissed, shall apply in like manner to a petition for judicial separation.

Divorce throughout this Act, unless it otherwise appears, clearly means divorce *a vinculo*, and the only question which arises is the meaning of the words "might have been presented." It was suggested that those words mean "might have been presented before the passing of this Act," but it is to be noted that, in the subsection which I have read, there follows a phrase in which a decree for divorce *a mensa et thoro* is referred to as one which might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857. The words "immediately before the commencement of this Act" are not used in conjunction with the words "might have been presented" in reference to the petition for divorce, and it appears to me that the words "might have been presented" must, therefore, mean "might have been presented under the provisions of this Act." In those circumstances, there being a provision in this Act that three years' desertion immediately preceding the presentation of the petition shall be a ground for divorce, it follows that a judicial separation can be pronounced on the same grounds. I find no difficulties about the facts of this case. There has clearly been three years' desertion immediately preceding the presentation of the petition, and, therefore, there will be a decree of judicial separation, with costs, and custody of the child.

Solicitors: *White & Co.* (for the petitioner).

[*Reported by* D. ARMSTEAD FAIRWEATHER, ESQ., *Barrister-at-Law.*]

Re GREAT EASTERN ELECTRIC CO., LTD.

[Chancery Division (Simonds, J.), **February 24, 25, March 10, 1941.**]

Companies—Winding up—Voluntary winding up—Carrying on business of company—Priority of post-liquidation creditors over pre-liquidation creditors—Companies Act, 1929 (*c.* 23), *ss.* 191 (1) (*b*), 248 (1) (*b*).

On Mar. 24, 1938, the directors of a company made a declaration of solvency under the Companies Act, 1929, s. 230. On Mar. 28, 1938, they passed a resolution that the company should be wound up voluntarily and appointed H. as liquidator. H. carried on the business of the company until May 8, 1939, when an order was made for the compulsory winding up of the company and a new liquidator appointed. The assets of the company were then realised, and the liquidator asked for the direction of the court as to the order in which the creditors should be paid. At the date of the resolution for voluntary winding up, there were a number of creditors of the company and to most of these H. had paid dividends amounting to 10*s.* in the £. In carrying on the business of the company, H. had incurred debts which he had not discharged. There were also the costs and expenses of the liquidation, the remuneration of the liquidator, and the costs of the present proceedings. The sum realised was only sufficient to meet a fraction of these items :—

Held : in the circumstances, although his judgment had been falsified by the events, H. had reasonably formed the view that it was necessary for the beneficial winding up of the company to carry on the business as he did, and he was, therefore, entitled to his proper remuneration, and the debts incurred in so carrying on the business must be paid in priority to those incurred before the commencement of the voluntary liquidation.

[**EDITORIAL NOTE.** The contest in the present case is between the two classes of creditors, those whose debts were incurred before the voluntary liquidation and those whose debts were incurred by the liquidator in carrying on the business of the company. The priority of the latter is held to depend solely upon whether, as a matter of fact, the continuance of the business of the company was for the beneficial winding up and, therefore, in the interests of the creditors generally. The decision upon this matter of fact is, of course, extremely difficult in the peculiar circumstances of this case, since the period covered is that immediately before the outbreak of war ; but, once that question is decided, it is held that the priorities of the creditors necessarily follows.

As to Distribution among Creditors, see HALSBURY, Hailsham Edn., Vol. 10, pp. 697-699, paras. 1164-1166 ; and for Cases, see DIGEST, Vol. 10, pp. 955, 956, Nos. 6550-6555.]

Cases referred to :

(1) *Re National Arms and Ammunition Co.* (1885), 28 Ch.D. 474 ; 10 Digest 1053, *7363* ; 54 L.J.Ch. 673 ; *sub nom. Re National Arms and Ammunition Co., Ltd., Ex p. Birmingham Corpn.*, 52 L.T. 237.

(2) *Re Wreck Recovery and Salvage Co.* (1880), 15 Ch.D. 353 ; 10 Digest 923, *6334* ; 43 L.T. 190.

Adjourned Summons taken out by the liquidator in the compulsory winding up to determine the order of application of the assets of the company. The facts are fully set out in the judgment.

H. E. Salt for the liquidator, the applicant.

I. J. Lindner for the first respondent.

E. M. Winterbotham for the second respondent.

C. D. Myles for the third respondent.
E. C. Ryder for the fourth respondent.
D. W. Markwick for the fifth respondent.

Simonds, J.: On Mar. 24, 1938, the directors of this company, which is now in compulsory liquidation, made a declaration of solvency under the Companies Act, 1929, s. 230, and four days later a resolution was duly passed whereby it was resolved that the company should go into voluntary liquidation by way of a members' voluntary winding up and that the respondent Houstoun should be the liquidator. Houstoun, who had been a director of the company until 1931, when he resigned his directorship, and was by profession an accountant, duly assumed office as liquidator, and in that capacity continued to carry on the business of the company until at least April 21, 1939. On that date a petition was presented to this court, upon which, on May 8, 1939, an order was made for the winding up of the company by the court. In the compulsory liquidation, the applicant, F. E. Bendall, was in due course appointed liquidator. The applicant's investigation of the affairs of the company discloses the following material facts. First, Houstoun, as liquidator, distributed dividends amounting to 10*s*. in the £ to nearly, but not quite all, the creditors of the company at the date of the commencement of the voluntary winding up. These I will call the pre-liquidation creditors. He thus paid out the sum of £3,116 to creditors for £6,232. Secondly, he neglected to make any payment to pre-liquidation creditors whose debts amounted to about £70. Thirdly, in carrying on the business of the company, he incurred obligations to creditors, whom I will call the post-liquidation creditors, which he did not discharge, amounting to about £1,379. Fourthly, the whole of the assets of the company have now been realised, and there is now available to meet the costs and expenses of the liquidation and these proceedings and the remuneration of the liquidator and the claims of the pre-liquidation and the post-liquidation creditors the wholly inadequate sum of about £800.

In these circumstances, two questions arise: (i) what are the rights of the two classes of creditors, (ii) whether Houstoun is entitled to be paid any, and, if so, what, remuneration out of the assets of the company. By virtue of the Companies Act, 1929, ss. 191 (1) (*b*), 248 (1) (*b*), a liquidator in a voluntary winding up may without any sanction carry on the business of the company so far as may be necessary for the beneficial winding up thereof. If, in the proper exercise of this statutory power, he incurs obligations, those to whom he incurs them are entitled to be paid out of the assets of the company in priority to its creditors at the commencement of the winding up. In my judgment, it cannot make any difference whether the obligation be in respect of rent or rates or goods, if it is incurred in the due course of winding up and the condition is satisfied that the continuance of the business is necessary for the beneficial winding up:

see *Re National Arms & Ammunition Co.* (1), and particularly *per* BOWEN, L.J., at p. 481. The test will be the same whether, as is the most usual case, the liquidator, having discharged the obligation; claims to be allowed it in his accounts, or whether, as here, the post-liquidation creditors, not having been paid, claim to rank in priority to the pre-liquidation creditors. There can be no question of the two classes ranking *pari passu*. If the condition is satisfied, the post-liquidation creditors come first. If it is not, they do not come in at all, or, at any rate, not until the pre-liquidation creditors have been satisfied. It is unnecessary to determine anything more than that. In the present case, it has been contended that Houstoun, the voluntary liquidator, in carrying on the business for as long as he did, was not properly exercising his statutory power, and that, therefore, the post-liquidation creditors cannot claim to be paid out of the assets of the company in priority to the pre-liquidation creditors. It is suggested that in that case they would have some claim against the liquidator personally, but that is a question which does not arise in these proceedings, and I express no opinion upon it. In considering whether the liquidator was properly exercising his statutory power, I am guided by the words of SIR GEORGE JESSEL, M.R., in *Re Wreck Recovery & Salvage Co.* (2), where, in regard to the identical language of the Companies Act, 1862, s. 95, he says, at p. 360:

> Now the word " necessary " means that it must not be merely beneficial but something more, though the necessity must be determined by the court, having regard to all the circumstances of the case. It does not, of course, mean that no other course would be possible. Then it must be for the " beneficial winding-up " of the business of the company . . . not with a view to its continuance.

The liquidator has sworn that, at the time of his appointment as liquidator on Mar. 28, 1938, he looked into the position of the company and came to the conclusion that the company would be able to pay 20*s*. in the £ provided that the assets could be gradually realised to advantage, and that he decided that it would be to the benefit of the creditors, and also to that of the shareholders, that he should continue to carry on the business of the company. Also, he has further sworn that the carrying on of the business was a mercantile necessity, and that it was carried on for the beneficial winding up of the affairs of the company. Those statements have been somewhat vaguely challenged, but the deponent was not cross-examined, nor, though his judgment has been criticised, has his integrity or good faith been impugned. I cannot disregard the fact that he assumed office upon a declaration of solvency, which means that the directors had formed the opinion that the company would be able to pay its debts in fact in a period not exceeding 12 months from the commencement of the winding up. He was not bound to attach as little value to such a declaration as a judge who has administered company law for a period of years, and had in fact, as he says, come to the same conclusion himself after an investigation of the company's affairs. There was not, therefore, any apparent urgency to realise the company's assets, and, in my judgment, he cannot be held blameworthy for thinking, as he said he did think, that the continuance of the business was necessary to its beneficial winding up. It is easy to be wise after the event and to say that at this point or that he ought to have realised the danger or the undesirability of a further continuance, but it is fair to say that his hopes of a successful issue were largely disappointed (i) by the dislocation which followed upon the international crisis of Sept., 1938, and (ii) by a false estimate, for which I cannot hold him responsible, of the value of a lease which appeared to be, but was not, a valuable asset of the company. On the whole, then, I have come to the conclusion that the liquidator properly exercised his statutory power of carrying on the business with a view to the beneficial winding up of the company. It is possible that, had he been endowed with greater foresight, he might have acted differently, but I do not think that SIR GEORGE JESSEL, M.R., meant by the words which I have cited that an objective standard should be set up after the event and the conduct of the liquidator judged by this. It is sufficient if he *bona fide* and reasonably forms the opinion that the carrying on of the business is necessary for the beneficial winding up of the company. His reasonable opinion, like that of other men, may be falsified by events.

It follows from what I have said that the post-liquidation creditors must be paid before any further payment is made to any pre-liquidation creditor. It follows, further, that I should not be justified in depriving the voluntary liquidator, Houstoun, of his proper remuneration, which will in the usual way be fixed by the registrar in chambers. These proceedings have been instituted by the present liquidator, and the costs of all parties must be paid by him out of the assets in priority to any other claim. Finally, I wish to make it clear that I express no opinion as to whether the liquidator was justified in making any payment to pre-liquidation creditors without retaining sufficient money to satisfy all post-liquidation creditors, nor whether any particular post-liquidation creditor gave credit to him or, as he says, looked only to the assets of the company.

Assets to be distributed as follows : Taxed costs of all parties ; liquidation expenses ; post-liquidation creditors pari passu inter se.

Solicitors : *H. W. & S. Patey* (for the applicant and for the last three respondents) ; *H. Howard & Co.* (for the first respondent) ; *Page, Moore & Page* (for the second respondent).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

R. *v.* NATIONAL ARBITRATION TRIBUNAL, *Ex parte* BOLTON CORPORATION.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Atkinson and Tucker, JJ.), **March 13, 18, 1941.**]

Trade and Trade Unions—Settlement of trade differences and disputes—Reference to National Arbitration Tribunal—"Trade Dispute"—"Workman" Industrial Courts Act, 1919 (*c.* 69), *s.* 8—*Local Government Staffs* (*War Service*) *Act,* 1939 (*c.* 94), *s.* 1—*Defence* (*General*) *Regulations,* 1939 (*S.R. & O.,* 1940, *No.* 1217), *reg.* 58AA—*Conditions of Employment and National Arbitration Order,* 1940 (*S.R. & O.,* 1940, *No.* 1305), *art.* 2.

By the Conditions of Employment and National Arbitration Order, 1940, art. 2, the Minister of Labour and National Service is given power to refer any "trade dispute" to the National Arbitration Tribunal for settlement. Purporting to act under this power, the Minister referred to arbitration a claim by the National Association of Local Government Officers that it should be a condition of service of the officers in the employment of a certain local authority that, in the event of their being called upon to serve in His Majesty's forces or in the civil defence units, the difference between their pay in such forces and the remuneration they would have received if they had continued in the service of the local authority should be made up to them. The local authority applied for an order prohibiting the arbitration tribunal from adjudicating upon the dispute on the ground that there was no "trade dispute" within the meaning of that term as used in the order:—

HELD: [ATKINSON, J., *dissenting*] (i) the term "trade dispute," both in the above order and in the Industrial Courts Act, 1919 (from which the definition in the order was taken), is not restricted to a dispute arising in a trade, but includes any dispute connected with employment or non-employment, or with the terms of the employment or with the conditions of labour, which arises between employers and workmen, whether or not the workmen are engaged in a trade.

(ii) whether all the officers of the local authority were workmen—that is, "persons who have entered into or work under a contract with an employer, whether the contract be by way of manual labour, clerical work or otherwise"—was a matter for the tribunal to determine, and it would confine its award to such officers as were within the definition. *Per* VISCOUNT CALDECOTE, L.C.J.: the words "or otherwise" made the definition wide enough to include the professional, technical or administrative staff.

(iii) the provision of payments upon or after the termination of an employee's service is a matter "connected with the terms of" his employment.

(iv) even if the Local Government Staffs (War Service) Act, 1939, conferred upon local authorities only a power to make *ex gratia* payments to their officers to supplement payment for war service, those authorities would not be acting unlawfully in agreeing, before the event arose, to make certain payments to such officers.

[**EDITORIAL NOTE.** This is an application for an order of prohibition and it has, therefore, to be shown that the whole matter suggested for arbitration is outside the statutory provisions regulating the matter. If only some aspects of the matter, or some of the parties said to be affected by any award which may be made, are outside the terms of the statute or order made thereunder, then it must be assumed that the tribunal will exercise its jurisdiction in a proper manner and exclude those matters or persons from its findings. For this reason the arguments based on the definition of "workman" appear clearly to break down, but the operation of the words "or otherwise," which are stated to have a very wide effect, has given rise to difference of opinion and it would not be difficult to find authority tending to restrict the meaning of such an expression. The other matters—namely, whether there is a "trade dispute" and whether purely discretionary payments can be the subject of a general term to be inserted in all contracts of employment by a local authority—go to the root of the whole matter, and, if they had been decided in favour of the applicants, an order must have issued. As will be seen from the judgments these matters have given rise to a difference of opinion. They are matters of the utmost importance not only to the parties immediately concerned, but to the public generally and particular attention must be directed to the second of these matters. Local authorities are now very much creatures of statute and the employment by them of officers and others to carry out their manifold duties is governed by statute. In 1939, Parliament saw fit to grant them power at their discretion to pay their employees a sum which should not exceed their loss of pay by reason of their joining the forces or the civil defence units. If the ultimate result aimed at in these proceedings is a ruling that employees of local authorities are in all cases entitled as a matter of right to have their army pay made up in cash to the full amount of their wages in civil life, it would appear to be inconsistent with the discretion given by the Act. This, however, is a matter which can be provided for in the award on the arbitration. The only effect of the decision here given is that the matter is a proper one for a particular form of arbitration.

As to Remuneration of Officers, see HALSBURY, Hailsham Edn., Vol. 21, pp. 136, 137, para. 248; and for Cases, see DIGEST, Vol. 33, pp. 75, 76, Nos. 483-494.]

Cases referred to:

(1) *Fielding* v. *Morley Corpn.*, [1899] 1 Ch. 1; 42 Digest 604, *52;* 67 L.J.Ch. 611; 79 L.T. 231; *affd.*, [1900] A.C. 133.

(2) *Fenton* v. *Thorley & Co., Ltd.*, [1903] A.C. 443; 42 Digest 648, *543;* 72 L.J.K.B. 787; 89 L.T. 314; 5 W.C.C. 1.

(3) *Re Mayfair Property Co., Bartlett* v. *Mayfair Property Co.*, [1898] 2 Ch. 28; 10 Digest 734, *4593;* 67 L.J.Ch. 337; 78 L.T. 302.

(4) *Heydon's Case* (1584), 3 Co. Rep. 7a; 42 Digest 614, *143.*

Motion for an order of prohibition prohibiting the National Arbitration Tribunal from adjudicating upon a dispute between the Bolton Corporation and the National Association of Local Government Officers. The facts are fully set out in the judgment of Atkinson, J. It was stated that there were 4,100 employees of the Corporation, of whom 510 were officers.

The Conditions of Employment and National Arbitration Order, 1940, provides as follows:

> 2. (1) If any trade dispute exists or is apprehended that dispute, if not otherwise determined, may be reported to the Minister by or on behalf of either party to the dispute and the decision of the Minister as to whether a dispute has been so reported shall be conclusive for all purposes.
>
> (2) The Minister shall consider any dispute so reported to him as aforesaid and if in his opinion suitable means for settling the dispute already exist by virtue of any agreement to which the parties are organisations representative of employers and workers respectively, he shall refer the matter for settlement in accordance with these provisions: so, however, that where a matter has been referred for settlement in accordance with the provisions of this paragraph and there is a failure to reach a settlement or, in the opinion of the Minister, a settlement is unduly delayed, the Minister may cancel the reference and substitute therefor a reference to the National Arbitration Tribunal.
>
> (3) Where in his opinion no suitable means of settlement exist as are mentioned in the last preceding paragraph of this Article, the Minister shall take any steps which seem to him expedient to promote a settlement of the dispute and may, if he thinks fit, refer the matter for settlement to the National Arbitration Tribunal.

(4) Where steps to promote the settlement of a dispute have been taken by the Minister under the provisions of paragraph (2) or paragraph (3) of this article (otherwise than by means of a reference to the National Arbitration Tribunal) and those steps have not resulted in a prompt settlement of the dispute, the Minister shall refer the dispute for settlement to the National Arbitration Tribunal and shall do so within 21 days from the date on which the dispute was so reported to him as aforesaid, unless, in his opinion, the special circumstances of the case make it necessary or desirable to postpone such a reference.

(5) Any agreement, decision or award made by virtue of the foregoing provisions of this Article shall be binding on the employers and workers to whom the agreement, decision or award relates and, as from the date of such agreement, decision or award or as from such date as may be specified therein, not being earlier than the date on which the dispute to which the agreement, decision or award relates first arose, it shall be an implied term of the contract between the employers and workers to whom the agreement, decision or award relates that the rate of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with such agreement, decision or award until varied by a subsequent agreement, decision or award.

Sydney G. Turner, K.C., and *E. J. C. Neep* for the Bolton Corporation.

W. P. Spens, K.C., and *C. Erskine Simes* for the National Association of Local Government Officers.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *W. Arthian Davies* for the Minister of Labour and National Service.

Turner, K.C.: The jurisdiction of the tribunal is restricted to adjudication on a trade dispute as defined by the order. There is here neither a trade dispute not a dispute in a "trade" in the ordinary sense. In many cases, the officers of the corporation are not workmen within the meaning of the order. The question here is not connected with the employment or with the terms of employment. When an officer leaves to take up war service, he ceases to be employed by the corporation.

Spens, K.C.: Any demand for an increase in wages or any other matter which is connected with the terms of employment would come under this order. There is nothing in the Industrial Courts Act, 1919, which shows that an "officer" as such is excluded. The order will operate only in respect of a person who is a workman and who is a member of the trade union which has brought the case. Every individual who is working under a contract of service is a "workman." The corporation will be able to come to the court to have an award suppressed in any case where the employee is shown to be an officer, and not a workman. The terms of reference adopted by the Minister must be assumed to be within his powers.

Solicitor-General: Even if the Local Government Staffs (War Service) Act, 1939, only gives the corporation power to make discretionary payments, yet, if it gives a power to make such payments, it must also give a power to contract to make such payments.

VISCOUNT CALDECOTE, L.C.J.: An order of prohibition is sought on behalf of the Bolton Corporation to prohibit the National Arbitration Tribunal from adjudicating upon a dispute between the Bolton Corporation and the National Association of Local Government Officers, which I will call the association. The dispute was referred to the tribunal for settlement by the Minister of Labour and National Service in purported exercise of powers conferred on him by the Conditions of Employment and National Arbitration Order, 1940, art. 2. If this order does not authorise the reference by the Minister of Labour, the order of prohibition must issue. It is not surprising that the applicants should scrutinise the order closely in order to see whether they are under an obligation to have the dispute in question referred, whether they will or no, to the tribunal, with all the possible consequences. While it is important, and, indeed, essential, that Ministers should not be hampered in the full exercise of the powers entrusted to them under the authority of Parliament in the present emergency, it is no less important to see that those powers are not exceeded.

The Conditions of Employment and National Arbitration Order, 1940, which I will call the order, was made by the Minister of Labour and National Service by virtue of the powers conferred on him by the Defence (General) Regulations, 1939, reg. 58AA. Those regulations were themselves made by order in council under powers conferred on His Majesty by the Emergency Powers (Defence) Act, 1939. No question is raised as to the validity either of reg. 58AA or of the order. The questions which arise are wholly concerned with the interpretation of the order. Under art. 2 of the order, the Minister has power, in certain circumstances, to refer what is called a "trade dispute" to the tribunal constituted by him under art. 1 of the order. The Minister has no power to refer to the tribunal any dispute other than a "trade dispute." It is unnecessary for the purposes of this judgment to repeat at length the provisions of art. 2 of the order. The dispute arises, according to the Minister's minute of reference, out of a claim by the association that it shall be a condition of service of officers in the employment of the Bolton Corporation that, in the event of their serving in His Majesty's forces or in civil defence units, they shall have made up to them the difference between their new pay and the remuneration which they would have received if they had remained in the actual service of the corporation. The precise meaning to be assigned to the word "officers" in the association's claim was debated in the course of the argument. We were referred to a definition of "officers" to be found in the Local Government Superannuation Act, 1937, s. 40, but that is a definition of the word "in this Act," and throws little light, in my opinion, on the sense in which the word is used in the Minister's minute of reference. The association was regarded by the Minister and by the corporation for the purposes of the dispute as representing the members of the association who are servants of the corporation. The association seems, as its full title suggests, to admit to membership only persons who may be described as local government officers. If, in the event of the arbitration proceeding, it were to be found that some members of the association are not "officers" within the meaning of the Minister's minute of reference, they would not be included in the arbitration.

In the first place, it is necessary to consider whether there is a "trade dispute." The order contains a definition of "trade dispute." The expression may seem inapt to describe a dispute between a corporation and persons having annual salaries of several hundred pounds, as some of the officers have. The first submission of counsel for the corporation A was that a trade dispute must be a dispute in a trade, using the word "trade" in its ordinary sense. The corporation, counsel said, does not carry on a trade, and, therefore, no trade dispute exists. This would have great force if it were not for the definition, but I think that the argument fails for the reason that the expression must be taken to have B the meaning assigned to it by the definition contained in art. 7 of the order, and no other meaning. It is the same definition as is found in the Industrial Courts Act, 1919. This follows from the language of reg. 58AA, which provides that "trade dispute" shall have the same meaning as in the Industrial Courts Act, 1919. That meaning is as follows:

> C . . . "trade dispute" means any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person.

In applying that definition, it is necessary to consider the meaning given to the word "workman." In the order, it has the meaning ascribed D to it in the Industrial Courts Act, 1919. The definition is as follows:

> . . . "workman" means any person who has entered into or works under a contract with an employer whether the contract be by way of manual labour, clerical work, or otherwise, be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour.

I observe that there are some persons who are "workmen" within the E latter definition and are yet capable of being members of the association—such persons, for instance, as have a contract with the corporation "by way of clerical work." This appears from the rules and constitution of the association and from an exhibit to the affidavit of the deputy town clerk of Bolton. As to these persons, there will clearly be a "trade F dispute" within the meaning of the order between them (or the association acting on their behalf) and the corporation. There are, however, we were informed, other servants of the corporation who have professional, administrative or technical duties, and the question arises whether such persons come within the word "workman" as defined. G As to that, I am of the opinion that the definition of "workman" is wide enough to include employees who form the professional or technical or administrative staffs as well as the clerical staffs. It is, I agree, a strained and unnatural meaning, but it is the meaning given by the definition. Any persons working under a contract of employment with H the corporation, even though they perform neither "manual labour" nor "clerical work," come in by reason of the word "otherwise." This, again, is a clumsy word in this context, but I think that its meaning is plain. It was argued that the word must be construed *ejusdem generis* with "manual labour" and "clerical work." I do not accept this interpretation. In this place, I think that the words "or otherwise" are intended to be the antithesis of the two immediately preceding expressions. The sentence is to be read as if it said: "Whether by way of manual labour, clerical work or some duty which is neither manual labour nor clerical work." For these reasons, I have formed the opinion that all the servants of the corporation are "workmen" for the purposes of the definition of "trade dispute," and, inasmuch as there is admittedly A a dispute, and as, in my opinion, it is a dispute between employers and workmen, I think that there is a "trade dispute," subject, however, to a further point taken by counsel for the corporation.

The definition of "trade dispute" requires the dispute to be:

> . . . connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person. B

It was submitted that the claim of the association—and, therefore, the dispute—was not within any of these words, and that the only possible part of this sentence which could be prayed in aid by the association was the expression "the terms of the employment. . . . of any person." C I agree that these are the material words. The submission made by counsel for the corporation was that the claim dealt with the pay of the persons concerned after they ceased to be in the service of the corporation, and was, therefore, not connected with the terms of their employment by the corporation. This argument rested in part on a provision D contained in an Act of Parliament passed almost immediately after the outbreak of the present war—namely, the Local Government Staffs (War Service) Act, 1939—and in part also on an expression in the National Service (Armed Forces) Act, 1939, s. 14, where it is stated to be the duty of any employer in the circumstances named to "reinstate" a former E servant who left to take up war service. By the Local Government Staffs (War Service) Act, 1939, s. 1, a local authority was empowered to pay to a person who was, in the words of the schedule, an "employee of a local authority otherwise than in war service" a sum which should not exceed the remuneration which he would have received if he had continued to F serve in his civil capacity, after deducting therefrom the amount of his war service pay. This enactment was relied on to enforce the contention that, as the claim of the association was that the persons concerned should receive remuneration after they had ceased to serve the corporation in their civil capacities, it was, therefore, not connected with the terms of G their employment by the corporation. That is not an argument which I can accept. A decision by the corporation to make a fresh contract of employment with their servants that they would make up their war pay to the level of their remuneration received while continuing to serve in their civil capacity seems to me no different in principle from a decision H of the corporation to engage a servant on the terms that, on ceasing to be in their service, he would be paid a lump sum, or an annual sum for a term of years or for life, subject to any conditions which might be agreed.

In the present case, it is suggested by the association that a condition should be imported into all the contracts of employment of workmen in the service of the corporation. I express no opinion whatever as to the reasonableness of such a proposal, or as to the extent to which it should be made to apply. These are matters for the tribunal, if and when the dispute comes to the tribunal for settlement, but that the terms of employment of a servant of the corporation may as a matter of words include a term to the effect suggested, even though it only operates after the employment has come to an end, is, I think, clear. This observation disposes also of the argument based on the National Service (Armed Forces) Act, 1939, s. 14.

One further objection was taken by counsel for the corporation—namely, that the corporation were unable to go beyond the discretion which the Local Government Staffs (War Service) Act, 1939, gave them to make up the war service pay of their employees on leaving their employment, and that, if the tribunal were to decide that the suggested term should be a condition of service of persons in the employment of the corporation, the decision would have the effect of depriving the corporation of their discretion. Moreover, it was said that it would have the effect of making an *ex gratia* payment to a number of persons, and in any case the payment would be more than the reasonable remuneration, which, apart from the Act of 1939, was all they were entitled to pay: Local Government Act, 1933, s.106 (2). This seems to me to be another presentation, or an expansion, of the argument I have already discussed on the meaning of the phrase "terms of the employment." Assuming—as I think I am entitled to assume—that, as a consequence of the 1939 Act it is proper for a servant of the corporation to receive the payments in question after he leaves their service to perform war services, whenever the corporation decide so to exercise their discretion, I see nothing irregular or in excess of their powers if they bind themselves or are required by the award of the tribunal to bind themselves in advance to make similar payments. It is true that this means giving up their discretion. Compulsory arbitration has not always been approved as a method of settling disputes, but, if a party to a dispute is forced to submit his case to arbitration, it is very likely that he will be deprived of a right, which he would otherwise have, of deciding the matter in issue for himself. As to whether such payments would be more than reasonable remuneration, if it could be assumed that the tribunal would approve the claim, that could be only on the ground that the payment ensuing was justifiable as part of the reasonable remuneration of the servant. What is reasonable remuneration is a question of fact.

On the whole case, it has to be remembered that this order and the procedure it provides were designed with a view to prevent the interruption of work by trade disputes. The order goes back for its ultimate sanction to the wide language of the Emergency Powers (Defence) Act, 1939, s. 1. The defence of the realm, the efficient prosecution of the war, and the maintenance of services essential to the life of the community are vital interests, and disputes of the nature called trade disputes in the order are admittedly incidents which, in these interests, it is desirable to prevent. If there is such a dispute in which neither party will yield, arbitration is the remedy here provided. There is no reason to suppose that this tribunal will act either unreasonably or illegally, or that it will make an award on a dispute affecting persons who are not "workmen," and, therefore, not properly within the scope of the order. A If there is a trade dispute of a nature covered by the order, as I think there is, then, whatever difficulty there may be in identifying the individual persons, or classes of persons, involved in this dispute, the tribunal should not, in my opinion, be prohibited from entertaining it. In my opinion, this application should be refused. B

ATKINSON, J.: This is a motion on behalf of the Bolton Corporation to prohibit the National Arbitration Tribunal from adjudicating upon a dispute between the National Association of Local Government Officers and the corporation which has been referred to the tribunal as a trade C dispute by the Minister of Labour under the Conditions of Employment and National Arbitration Order, 1940, art. 2. The dispute arises out of a claim that it shall be a condition of service of officers in the employment of the council that, in the event of their serving in His Majesty's forces or in civil defence, they shall have made up to them the difference between D their new pay and the remuneration which they would have received if they had remained in the actual service of the corporation.

The grounds upon which the motion is based are, broadly, that the dispute is not a "trade dispute" within the order, and that the claim is for something which the corporation has no power to concede. The E power of a borough council to appoint officers is to be found in the Local Government Act, 1933, s. 106, which provides as follows:

> (1) The council of every borough shall appoint fit persons to be town clerk, treasurer, surveyor, medical officer of health and sanitary inspector or inspectors, and shall also appoint such other officers as the council think necessary for the efficient discharge of the functions of the council. (2) . . . the council may pay to an officer F appointed under this section such reasonable remuneration as they may determine, and, subject as aforesaid, every such officer shall hold office during the pleasure of the council.

An officer, therefore, is someone appointed to assist in the efficient discharge of the functions of the council, and the power of the council as to remuneration is limited to paying to an officer (not to someone G who has ceased to be an officer) such reasonable remuneration as they may determine. The definition of an officer at p. 5 of the rules and constitution of the association is in harmony with the statutory meaning.

The dispute arises in this way. By the Local Government Staffs (War Service) Act, 1939, where an employee of a local authority ceases so to H serve in order to undertake war service, the local authority shall have power to pay to and in respect of him such a sum as shall not exceed the remuneration which he would have received if he had continued to serve in his civil capacity after deducting therefrom the amount of his war service pay. Thereupon, the association began to exert pressure upon the Bolton Corporation to induce them to declare that they would make up the full remuneration of any of their officers who joined His Majesty's forces. The corporation, after consideration, declined to do so, whereupon the association reported a dispute to the Minister of Labour and National Service. The Minister took the view that the dispute could be A so framed as to constitute a "trade dispute" within the order, and, by a document, dated Feb. 4, 1941, referred to the National Arbitration Tribunal the dispute which I have described.

The claim, therefore, is on behalf of all officers actually employed by the corporation on Feb. 4, 1941, who are members of the association. B By the Defence (General) Regulations, 1939, reg. 58AA, with a view to preventing work from being interrupted by trade disputes, the Minister was empowered by order to make provision:

> . . . (*a*) for establishing a tribunal for the settlement of trade disputes, and for regulating the procedure of the tribunal.

C The regulation provided as follows:

> In this regulation the expression "trade dispute" has the same meaning as in the Industrial Courts Act, 1919.

In pursuance of that regulation, the Minister made an order on July 18, 1940, to come into force on July 25, 1940. Part I of the order constitutes D a tribunal, called the National Arbitration Tribunal, for the purpose of determining such trade disputes as the Minister shall refer to it. Such a reference is compulsory where steps to promote a settlement have failed. Part III provides that, when, in a trade or industry, there are terms and conditions of employment recognised by substantial E proportions of employers and workmen, all employers in the trade or industry shall observe them. Part IV deals with departures from trade practices. Part V contains the definitions of "trade dispute" and "workman" which have been read, and which are taken from the Industrial Courts Act, 1919.

F As reg. 58AA provided that the expression "trade dispute" had the same meaning as it had in the Industrial Courts Act, 1919, it is necessary to determine what the definitions mean in that Act. The title of the Industrial Courts Act, 1919, indicates the purpose of the Act. It is now settled law that the title of a statute is an important part of the Act, G and may be referred to for the purpose of ascertaining its general scope, and of thus throwing light on its construction: *per* SIR NATHANIEL LINDLEY, M.R., in *Fielding* v. *Morley Corpn.* (1), at p. 3, and *per* LORD MACNAGHTEN in *Fenton* v. *Thorley & Co., Ltd.*, (2), at p. 447. The title describes the Act as follows;

> H An Act to provide for the establishment of an industrial court and courts of inquiry in connection with trade disputes, and to make other provision for the settlement of such disputes [and to continue certain provisions of the Wages (Temporary Regulation) Act, 1918].

Part I of that Act provides that, for the purpose of the settlement of trade disputes, there shall be a standing industrial court. Part II provides that the Minister of Labour may refer to a court of inquiry any matters appearing to him to be connected with the dispute. Part III continues certain provisions of the Wages (Temporary Regulation) Act, 1918. That Act provided for prescribed rates of wages for workmen employed in any trade or industry. There was no definition depriving these words of their ordinary meaning. It is clear, therefore, that the three operative parts of the Act of 1919 were concerned, and concerned only, with trade and industry. Part IV contains the two definitions in question. If there were no definition of "trade dispute," I imagine that most people would take the words to mean a dispute connected with trade between persons engaged in trade or in a trading operation, whether between one trader and another, or between a trader and his men, or between men and men. Certainly no one could have had any doubt but that the intention of the legislature was to provide for disputes connected with trade and industry, and nothing else. The legislature, however, did not intend to go so far as that even. It did not intend industrial courts to be used for settling disputes between one trader and another, and, therefore, a definition of "trade dispute," so framed as to exclude trade disputes of that kind and to make it clear that a trade dispute was limited to a dispute between the trader and his men, or between the men and men, was necessary. Further, the nature of the dispute was to be limited. It must concern, and concern only, as between employer and men, the terms of employment or the conditions of labour. There are two words in the definition of "trade disputes" to be construed—namely, "employers" and "workmen." There is no definition of "employers." It is said for the association that the word should be given the widest interpretation possible, and that the words "industry" and "trade," which occur repeatedly throughout the Act, must be ignored. It is said that Parliament meant by a mere definition to revolutionise the whole relationship of master and servant, so far as terms of employment were concerned. In short, it is said, that the word "employers" covers everyone, from the woman with a lady's maid to the London, Midland and Scottish Ry. Co.

On the other hand, it is argued that the Act was concerned with industry and trade, and nothing else, that the object of the definition was to define what kind of trade dispute was within the Act, that the only employers referred to are employers engaged in trade, and that the only disputes referred to are certain limited classes of "trade disputes." There is the same divergence of view as to the proper construction of the definition of "workman." The council say that it is controlled by a true interpretation of "trade dispute." The association say that it embraces every person working under a contract of service, whatever the nature of the service. If that had been the intention of Parliament, there would have been no need to go beyond the first two lines of the definition, but the definition continues: "whether the contract be by way of manual labour, clerical work or otherwise." Manual labour and clerical work are fairly descriptive of the main services rendered by workmen and workwomen in industry, and the word "otherwise" might reasonably cover such other services as are there rendered. The respondents contend, however, and their view forces them to contend, that this one word "otherwise" was inserted, regardless of grammar, in order to include in the expression "workman" everyone rendering, under a contract of service, professional services (as, for example, doctors, solicitors, accountants, teachers and nurses), administrative services and technical services (such as those rendered by managers of engineering works, electrical supply works, designers, borough engineers, and sanitary and food inspectors), artistic services (such as curators of galleries and museums, actors and chorus girls), political services and domestic services, and even the services of such an austere person as a bank manager. I cannot believe that, if all these services were intended to be covered by the definition, the only two to be specificially mentioned would be the two which least required mentioning. The fundamental rule of interpretation to which all others are subordinate is that a statute is to be expounded according to the intent of those who made it. The first rule of construction for determining that intent is that, if the words are unambiguous and precise, they must be construed in their natural and ordinary sense, and phrases and sentences must be construed according to the rules of grammar. This is called the rule of literal construction. Maxwell on Interpretation of Statutes has an interesting heading to a section dealing with this rule. It is "Fallacy of Literal Construction." I shall cite a few passages from the section :

> The rule is confined to cases where the language is precise and capable of but one construction. . . .

Can that be said of the word "otherwise" or the word "employers" in this definition ? Then the section continues as follows :

> . . . or where neither the history or cause of the enactment, nor the consequences to which the literal interpretation would lead show that that interpretation does not express the real intention. . . . It is another elementary rule that a thing which is within the letter of a statute will generally be construed as not within the statute unless it be also within the real intention of the legislature. . . . General words admit of indefinite extension or restriction according to the subject to which they relate and the scope and object in contemplation. To arrive at the real meaning it is always necessary to get an exact conception of the aim, scope and object of the whole Act.

To quote Sir Nathaniel Lindley, M.R., in *Re Mayfair Property Co.*, *Bartlett* v. *Mayfair Property Co.* (3), at p. 35 :

> In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's Case* (4) to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide and the remedy provided by the statute to cure that mischief.

The Industrial Courts Act, 1919, was concerned with industry and trade. These two words dominate the Act. To construe the Act or any part of it as if those words were not there is, in my judgment, wholly wrong. To construe the word "employers" as meaning every employer of any kind, the words "trade dispute" as including disputes having nothing to do with trade or industry, and the word "otherwise" as embracing every branch and kind of service other than manual labour and clerical work would be to give the Act a scope and effect which I am convinced the legislature never contemplated for one moment.

I agree with counsel for the corporation that the dispute here is not a trade dispute within the meaning of the Act of 1919 or reg. 58AA. Sect. 10 of the Act presents no difficulty. It merely means that, if the Crown, A
through a government department, employs workmen in industrial undertakings, as, for example, in dockyards and arsenals, the Crown shall be within the Act. A local authority is expressly brought within Part III of the order by a further definition of "trade or industry," as follows:

> "Trade or industry" includes the performance of its functions by a public or local authority. B

I cannot find anything in the regulations under which the order was made which enables the Minister to declare that the performance of its functions by a local authority is that which it is not—namely, a trade or industry—but, be that as it may, the obligation sought to be imposed C
by Part III is to observe recognised terms and conditions of employment as therein defined. The attempt here is to get an award to impose terms upon the council regardless of whether or not they are recognised terms. Counsel for the corporation next dealt with the question whether the dispute was connected with the terms of employment. He says that the D
council have statutory power to pay their officers reasonable remuneration, and that that means remuneration for services which are being rendered, and does not include a power to pay anything to people who have ceased to be officers. The Local Government Staffs (War Service) Act, 1939, recognised this limitation, and, therefore, gave a council power to make E
up the war service pay of a servant undertaking war service, and so ceasing to serve the council, to a sum equal to the remuneration he would have received if he had continued to serve. It is said that any such payment is, and must remain, discretionary. On this, he bases two contentions. The first is that the question whether or not a council should F
or ought to exercise this power is not a dispute connected with the terms of the employment of the persons concerned. The second is that, even if he is wrong about that, the National Arbitration Tribunal cannot be asked to award that the council shall agree to terms of employment which are beyond their statutory powers. G

The short argument in support of the first contention is that a term which is to relate to a period after the employment has ceased cannot be a term of the employment. As to the second contention, it is said that the power given by the Act of 1939 is discretionary, that the discretion is to be the discretion of the council, and can be exercised only after the H
employment has ceased and the officer has undertaken war service, and that a proper exercise of discretion involves a consideration of all the circumstances of each particular officer and the interests of the ratepayers. Further, it is said that the payment must be gratuitous throughout the whole period involved. For instance, an unmarried officer, if housed and fed by the state, would be far better off than before if his salary were made

up, whereas a married man with a household and family to maintain would not.

I do not agree with the contention that a contractual promise to make payments after a service has ceased cannot be said to be a term of employment. If, in order to retain a servant in its employ, a council agrees to make certain payments after the employment has ceased, it seems to me that that promise is one of the terms upon which he is employed. However, I agree with the contention that such a term is one to which the council cannot be compelled to agree against their own judgment. The making up of salary after service has ceased certainly cannot be regarded as within the power to pay reasonable remuneration to an officer. The payment is not remuneration, nor is it payment to an officer. Such a payment can be made legally only under sect. 1 of the Act of 1939. That section authorises gratuitous payments to be made in the discretion of the council.

It was urged by the Solicitor-General that, if a council has power to make a payment, it must also have power to contract to make it. I think that that is right so long as the agreement is itself an exercise of the discretion of the council. It seems to me that the power to pay or to agree to pay is a power to pay or to agree to pay if, and only if, the council think it right so to do in the exercise of its discretion. Neither the regulations nor the order can confer on the National Arbitration Tribunal the power to substitute its discretion for that of the council and to compel the council to incur contractual obligations to make payments which the council think ought not to be made. The council—not the National Arbitration Tribunal—are the statutory guardians of the money of the ratepayers. It is for them, and for them alone, to say when and how that money shall be spent. In my view, the order of prohibition should issue upon both the grounds which I have indicated.

Tucker, J.: By a minute, dated Feb. 4, 1941, the Minister of Labour and National Service in purported exercise of the powers conferred on him by the Conditions of Employment and National Arbitration Order, 1940, art. 2, made under the Defence (General) Regulations, 1939, reg. 58AA, referred to the National Arbitration Tribunal for settlement a trade dispute, reported to him on Aug. 21, 1940, to be existing or apprehended between the National Association of Local Government Officers and the Bolton Corporation, arising out of a claim by the association that it shall be a condition of service of officers in the employment of the corporation that, in the event of their service in His Majesty's forces or in civil defence, they shall have made up to them the difference between their new pay and the remuneration which they would have received if they had remained in the actual service of the corporation. The Bolton Corporation now apply to this court for an order of prohibition directed to the National Arbitration Tribunal, prohibiting them from adjudicating upon this dispute.

The grounds of the application were summarised in the argument of counsel for the corporation as follows. The jurisdiction of the tribunal is confined to "trade disputes" as defined in reg. 58AA, and there is here no "trade dispute" within the meaning of that definition, because (i) there is no "dispute" in a "trade," not, as I understand the argument, on the ground that the corporation are not traders, but on the ground that these particular employees, who are said to consist of persons engaged in administrative, technical or clerical duties, cannot be described as engaged "in a trade," (ii) some, at any rate, of the officers concerned are not "workmen" within the meaning of that word in the definition, and (iii) the claim relates, not to "terms of employment," but to *ex gratia* payments after employnent has ceased. I think, however, that the argument of counsel for the corporation involved a further distinct ground which is covered by (*e*) and (*g*) in the written statement of grounds upon which relief if sought, although he dealt with it in connection with (iii) above. It may be stated as follows. The tribunal is being asked to make an award which will compel the corporation contractually to assume an obligation towards its officers as a whole which it has no power to undertake, it being limited by statute to making *ex gratia* payments in its discretion to officers who have ceased to be in its service. In my view, this is a ground distinct from ground (iii), and I call it for convenience ground (iv), and will return to it later when I have dealt with the first three grounds.

In order to deal with these grounds, it is necessary to refer to reg. 58AA and the order made thereunder. The material parts of this regulation and order are as follows:

> With a view to preventing work being interrupted by trade disputes, the Minister of Labour and National Service may by order make provisions (*a*) for establishing a tribunal for the settlement of trade disputes, and for regulating the procedure of the tribunal. . . .

I think that it is relevant also, in considering the scope and object of the regulation, to observe in passing (*b*) and (*c*), which impose a prohibition with regard to lock-outs and strikes in trade disputes. Then subsect. (4) provides as follows:

> In this regulation the expression "trade dispute" has the same meaning as in the Industrial Courts Act, 1919.

The material parts of the order made under that regulation to which I think it is necessary to refer are the definitions of "trade dispute" and "workman" in Part V, cl. 7:

> . . . "trade dispute" means any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any persons . . . "workman" means any person who has entered into or works under a contract with an employer whether the contract be by way of manual labour, clerical work, or otherwise, be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour.

Both those definitions are taken *verbatim* from the Industrial Courts Act, 1919.

In my view, it is important to bear in mind that we are dealing with a wartime regulation made for the purpose of preventing work being interrupted by trade disputes in a time of national emergency, and, with this end in view, it is not surprising to find that the definition of "trade dispute,"which is taken from the Industrial Courts Act, 1919, and adopted in reg. 58AA, is in very wide terms. The language is plain, and I can see no necessity for looking elsewhere than at the words themselves to ascertain their meaning. They are unambiguous, and, in my view, it cannot be said that to give them their natural and ordinary meaning would produce results which could not have been intended by those who framed this regulation. Moreover, I can find nothing in the other parts of the Industrial Courts Act, 1919, from which the definition is taken, or in the order, which must of necessity restrict the language to disputes arising "in a trade." I think that the draftsman has deliberately used very wide language which is apt to include any dispute of the kind referred to which arises between employers and workmen, whether or not the workmen are engaged in a trade. In my view, therefore, ground (i) fails.

As to ground (ii), in my opinion, there is nothing in the evidence before us to show that the tribunal is being asked to adjudicate on the claims of persons who are not "workmen" within the meaning of the definition of workmen in the order. The affidavit of the deputy town clerk shows that there are 317 "officers" of military age employed by the corporation but not engaged on war service. There is nothing to indicate the nature of the work being performed by these men, or to show that their employment is of such a nature that they cannot be described as persons who have entered into or work under a contract with an employer whether the contract be by way of manual labour, clerical work or otherwise.

It may be that, when this dispute comes before the tribunal for adjudication, the evidence will show that all or some of the 317 persons described as "officers" are not workmen within the meaning of the definition, and, as to such persons, the tribunal will, no doubt, refuse to make any award. In my view, however, the mere fact that they are described as "officers" is not a sufficient ground upon which this court can say, at this stage, that it is satisfied that the tribunal is being asked to adjudicate in a dispute between the corporation and persons all or some identifiable number of whom cannot be workmen within the meaning of the definition. Speaking for myself, I do not find it possible, on the material before the court, to express any view as to whether or not such of the officers as may be proved in the course of arbitration to be performing administrative or technical duties may come within the definition of "workman." In my view, this ground also fails.

As to ground (iii), it is argued that an agreement to pay money to, or to confer any other benefit upon, an employee after he has left the service of his employer is not a matter "connected with the terms of his employment," even if the agreement is made at the time of his engagement or during the currency of his employment and in consideration of his continuing to serve. It is said that such payment or benefit can be " connected with the terms of the employment of any person " only if it is received during the currency of the employment. I can see no reason for giving these words such a restricted meaning. It appears to me that, if an employer and employee make it part of the contract between them that the employer shall confer some benefit on the employee on the termination of his service, or on his dependants at his death, such provision is clearly a matter " connected with the terms of the employment " of the employee. I think that this ground also fails.

There remains the ground which I have called (iv), as to which I confess I have felt some doubt. Counsel for the corporation contends that the only authority under which the corporation may make up the pay of its officers after they have left and gone on war service is to be found in the Local Government Staffs (War Service) Act, 1939. Sect. 1 of that Act provides as follows :

> (1) Where a person serving in any capacity specified in the first column of the schedule to this Act (hereafter in this section referred to as " his civil capacity ") ceases so to serve in order to undertake war service, the appropriate authority shall have power to make to or in respect of him such payments as are hereafter in this section provided.
>
> (2) While any such person is engaged in war service, the appropriate authority may pay to him, or to or for the benefit of his wife or other dependants nominated by him, a sum which shall not exceed the remuneration which he would have received if he had continued to serve in his civil capacity, after deducting therefrom the amount of his war service pay . . .

He says that this Act merely confers upon the corporation a power to make *ex gratia* payments in its discretion to persons after they have ceased to serve the corporation. Without such legislation, the corporation—unlike a private individual—could not use its moneys in this way. This, I think, was conceded by the respondents, but the argument advanced on behalf of the Minister was that, this Act having empowered the corporation to make a present, and having placed it in the same position as that of a private individual, there was nothing to prevent the corporation from binding itself contractually to do that which it was empowered to do voluntarily. Further, he contended that, apart altogether from the Act of 1939, the corporation had complete freedom with regard to its contracts with its employees.

The answer of counsel for the corporation was that the power of the corporation as to the employment of its officers and other servants is solely derived from, and regulated by, the Local Government Act, 1933, and the Local Government Superannuation Act, 1937. The statutory power to make such contracts is contained in the Local Government Act, 1933, s. 106 (2), which provides as follows :

> Subject, as respects the offices of medical officer of health and sanitary inspector, to the provisions of this Part of this Act, the council may pay to an officer appointed under this section such reasonable remuneration as they may determine, and, subject as aforesaid, every such officer shall hold office during the pleasure of the council.

For the purposes of that Act, an officer includes a servant. Counsel for the corporation contends that, prior to the Local Government Staffs (War Service) Act. 1939, if the corporation had contracted under the Local Goverment Act, 1933, s. 106, to pay their employees after they had left for war service, they would have been liable to be surcharged, on the ground that "reasonable remuneration" under that section could not be construed to include such payments and that, having regard to the statutory position of the employees of local authorities, "reasonable remuneration" within the meaning of the Local Government Act, 1933, s. 106, must be restricted to payments or other benefits to be received by employees during the currency of their employment. I think it may be correct to say that, prior to the Act of 1939, the corporation might have been surcharged if they had made contracts with their employees for payment to them of remuneration after they had left their service and had proceeded to implement such contracts; but, once they have been given statutory power in a certain event to make such payments gratuitously, I do not think that they can be held to be acting unlawfully if they agree with their employees before the event arises that they will, in the happening of that event, exercise their statutory powers in their favour, or that an agreement to this effect would result in the payment of remuneration which would not be reasonable within the meaning of the Local Government Act, 1933, s. 106. For these reasons, I agree with VISCOUNT CALDECOTE, L.C.J., that this application should be refused.

Application refused.

Solicitors: *Dyson, Bell & Co.* (for the Bolton Corporation); *J. M. McDonnell, Jackson & Co.* (for the National Association of Local Government Officers); *Solicitor to the Ministry of Labour* (for the Minster of Labour and National Service).

[*Reported by* C. ST.J. NICHOLSON, ESQ., *Barrister-at-Law.*]

Considered. WHITESIDE *v.* WHITESIDE. [1949] 1 All E.R. 756.

FREDENSEN *v.* ROTHSCHILD.

[CHANCERY DIVISION (Bennett, J.), **March 7, 12, 13, 1941.**]

Mistake—Rectification—Evidence of mistake—Annuity granted without sufficient reference to deduction of tax—Grantor paying annuity in full for 30 *years.*

By a deed of covenant, dated July 5, 1907, the settlor covenanted to pay the plaintiff "the clear yearly sum of £550." By a settlement dated Oct. 28, 1908, the settlor provided security for the performance of this covenant, which fact was unknown to the plaintiff for some years. To the time of his death in 1937, the settlor had paid the plaintiff £550 per annum, without deducting income tax, and had also paid the rent of her flat. After his death, his executors deducted tax from the annual payment. It was common ground between the parties that the form of the deed did not entitle the plaintiff to receive the annuity free of tax. The plaintiff claimed rectification of the deed so that she should receive £550 free of income tax, asserting that it was the intention of the settlor that she should receive this amount:—

HELD: a party asking for the rectification of a deed on the ground that it does not represent the true intention of the parties must clearly prove what that intention was. Although no suggestion of falsity was cast upon the evidence of the plaintiff, she had not discharged that burden, which, after the lapse of over 30 years, was an extremely heavy one.

[**EDITORIAL NOTE.** It is well-settled law that, to obtain rectification of a deed, the plaintiff must prove the intention of the parties to enter into the agreement represented by the deed as rectified. The point in the present case is that the fact that the grantor for 30 years acted as if bound by such an agreement is insufficient proof of such an intention prior to the agreement, and it is, of course, necessary to prove the intention prior to, and up to the time of, the execution of the instrument sought to be rectified.

AS TO EVIDENCE ON WHICH RECTIFICATION WILL BE GRANTED, see HALSBURY, Hailsham Edn., Vol. 23, pp. 157-160, paras. 227-232; and FOR CASES, see DIGEST, Vol. 35, pp. 137-144, Nos. 355-422.]

Cases referred to:

(1) *Fowler* v. *Fowler* (1859), 4 De G. & J. 250; 35 Digest 134, *340*.

(2) *Banks* v. *Ripley*, [1940] Ch. 719; [1940] 3 All E.R. 49; Digest Supp.

(3) *Shelburne* (*Countess Dowager*) v. *Inchiquin* (*Earl*) (1784), 1 Bro. C.C. 338; 35 Digest 137, *356*; *on appeal sub nom. Inchiquin* (*Earl*) v. *Fitzmaurice* (1785), 5 Bro. Parl. Cas. 166.

(4) *Townshend* (*Marquis*) v. *Stangroom, Stangroom* v. *Townshend* (*Marquis*) (1801), 6 Ves. 328; 35 Digest 134, *336*.

(5) *Jervis* v. *Howle & Talke Colliery Co., Ltd.*, [1937] Ch. 67; [1936] 3 All E.R. 193; Digest Supp.; 106 L.J.Ch. 34; 155 L.T. 572.

(6) *Burroughes* v. *Abbott*, [1922] 1 Ch. 86; 35 Digest 92, *17*; 91 L.J.Ch. 157; 126 L.T. 354.

(7) *Re Maclennan, Few* v. *Byrne*, [1939] Ch. 750; [1939] 3 All E.R. 81; Digest Supp.; 160 L.T. 612.

ACTION for the rectification of a deed of covenant. The facts are fully set out in the judgment.

H. Wynn Parry, K.C., and *E. M. Winterbotham* for the plaintiff.

C. E. Harman, K.C., and *Wilfrid M. Hunt* for the first and second defendants.

H. A. Rose for the third and fourth defendants.

BENNETT, J.: The transaction which has to be investigated was entered upon in July, 1907, more than 33 years ago. The facts which gave rise to the transaction are these. In Feb., 1906, the plaintiff, a spinster, and the late Lionel Walter Rothschild, who afterwards became Baron Rothschild, began to live together without going through the ceremony of marriage. The outcome of their association was the birth of a child in Dec., 1906. In June, 1907, the plaintiff and Rothschild found it necessary to separate because, according to the plaintiff's evidence, both she and Rothschild began to be persecuted by another woman with whom Rothschild had apparently cohabited before he began to live with the plaintiff. They parted as friends, the plaintiff says, and would not have parted but for the persecution of this other party. When they parted, Rothschild, fulfilling a promise which he had made to the plaintiff before their association began, entered into a deed of covenant, dated July 5, 1907, for the purpose of making financial provision for the plaintiff and their infant. I shall omit the formal parts of the deed. The parties to it are Rothschild, who is called the grantor, and the plaintiff, who is called the grantee. It recites the relationship which had existed between the parties and the fact that a child had been born as a result of the association. The operative part of the deed is as follows:

> The grantor doth covenant and agree with the grantee to pay to her or her executors and administrators during the joint lives of the grantee and the said Alice Muriel Olga Walters [the child of the association] and during the life of the survivor of them the clear yearly sum of £550 by equal quarterly payments, the first payment to be made in advance on the execution of these presents and so that the said sum in case of the coverture of the said grantee shall be for her separate use without power of anticipation and shall be subject to forfeiture if any act or event shall happen whereby the said sum or any part thereof shall become vested in or payable to some other person or persons or corporation.

Then there is a provision to the effect that the grantee shall not communicate with the grantor or his relatives, and that, if she does, the annuity is to be forfeited, and there is an arbitration clause for the purpose of getting a decision if it is alleged that the clause that the grantee is not to communicate has been violated. The instrument ends with this proviso:

> Provided always that in case the said grantor shall by will bequeath or secure to the said grantee during her life an annuity of equal or greater amount than the said sum here made payable as aforesaid then the annuity so bequeathed or secured shall be in satisfaction of such sum which in that case shall cease to be payable from the decease of the said grantor.

It is common ground between the parties, having regard to the authorities on the question, that the provision or the covenant by the grantor to pay to the grantee the clear yearly sum of £550 does not throw upon the grantor the burden of income tax attracted by that yearly sum or exonerate the grantee from having to pay the income tax attracted by the sum. The plaintiff's claim is to have the deed rectified so that it may be put into a shape in which she is freed from liability for income tax in respect of the annual payment of £550.

After the deed was executed in July, 1907, Rothschild paid the annuity through his solicitors in full. It was paid out of his taxed income, and he made no deduction of any kind for income tax in respect of the payments which were made to the plaintiff. The payments continued to be made until his death in Aug., 1937. In addition to paying the full annual sum of £550, until 1910 he paid the rent—namely, £250 per annum—of the flat in which the plaintiff was living at the time when the separation took A place, and then, when she lived in another flat, until the time of his death he paid the rent—namely, £200 per annum—of the other flat which the plaintiff occupied. Thus, throughout his life he treated her generously, and certainly in regard to the rent of the two flats he did what he had not bound himself to do. In addition to those payments, from time to B time he made other gifts of money to her. Besides entering into the deed of covenant of July 5, 1907, on Oct. 28, 1908, he made a settlement to which the plaintiff was not a party, and of which she knew nothing until years afterwards. By that settlement, he put into the hands of trustees some investments, and in that instrument there was in the C schedule a copy of the deed of covenant of July 5, 1907. The provisions of the trust deed were that the trustees should hold the stocks and shares specified in the deed upon trust to collect the income and to apply so much of the income as might be required for the purpose of making the payment provided for by the agreement specified in the schedule. Thus, D by that instrument, unknown to the plaintiff, he provided security for the performance of the covenant into which he had entered on July 5, 1907.

Upon Lord Rothschild's death, it fell to his executors to discharge those of his obligations which continued after his decease. E As, by the terms of the covenant of July 5, 1907, Lord Rothschild was not bound to pay the tax upon the annual sum which he had covenanted to pay to the plaintiff, before his executors made the quarterly payments to the plaintiff they not unnaturally deducted tax from them at the appropriate rate. If they had done otherwise, they would have F been responsible to those who were beneficially entitled to Lord Rothschild's property under his will. It is that fact which has given rise to this action. To the date when the statement of claim was delivered, the amount of the tax deducted by Lord Rothschild's executors, who are the first two defendants, amounted to £343 15*s*., and I have G no doubt that, since the payments referred to in the statement of claim were made, other quarterly payments in respect of the annuity have been made, from which the tax has been deducted.

The claim is to rectify the deed of covenant, and to rectify it in such a way as to free the plaintiff from her present liability to pay the tax upon H the annual sum of £550. The claim made in the statement of claim is in these terms:

> Rectification of the deed of covenant by inserting after the words "and during the life of the survivor of them" occurring in the said covenant the words "such a yearly sum as after deduction of income tax at the rate current from time to time will amount to £550."

That formula is now commonly used in a deed of covenant intended to secure an annuity free of tax. In addition to that claim, there is a claim for repayment of the sums of tax which the executors have deducted, and which, of course, upon the footing that the deed is rectified, they would have had no right to deduct, because Lord Rothschild would have been liable to pay the tax.

The claim to rectify is based upon these two allegations in the statement of claim. First of all, paragraph 2 alleges as follows:

> Baron Rothschild orally agreed with the plaintiff to make a provision for her and her child by way of annuity. The amount of the annuity so agreed to be provided was to be such as would give the plaintiff £550 after deduction of income tax.

That is a matter which the plaintiff has to prove if she is to succeed in her action. The second allegation which has to be proved as a matter of fact is set out in para. 6 of the statement of claim:

> When Baron Rothschild executed the said deed of covenant and when the plaintiff either executed the said deed or accepted the provision made for her thereby they did so believing that it did, and intending that it should, provide for the plaintiff an annuity of such amount as would give her £550 after deduction of tax, but by mutual mistake they only provided for her a clear annuity of £550.

In dealing with this case, it is important to have in mind those things about which the court has to be careful before making a decree for rectification. The principles upon which the court has to act are stated in the judgment of Lord Chelmsford, L.C., in *Fowler* v. *Fowler* (1), which I am reading from the report of a decision by Morton, J., in *Banks* v. *Ripley* (2). In that judgment, Morton, J., set out the passage from the judgment of Lord Chelmsford, L.C., by which, in considering the evidence, a court has to be guided. Lord Chelmsford, L.C., said, at pp. 264, 265:

> The power which the court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. Lord Thurlow, L.C.'s language [in *Shelburne* (*Countess Dowager*) v. *Inchiquin* (*Earl*) (3)] is very strong on this subject; he says [p. 341], " the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence "; . . . . And this expression of Lord Thurlow, L.C., is mentioned by Lord Eldon in *Townshend* (*Marquis*) v. *Stangroom* (4), without disapprobation. If, however, Lord Thurlow, L.C., used the word " irrefragable " in its ordinary meaning, to describe evidence which cannot be refuted or overthrown, his language would require some qualification; but it is probable that he only meant that the mistake must be proved by something more than the highest degree of probability, and that it must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the court is virtually making a new written agreement.

Those are the principles which the court has to have in mind in approaching and considering the proof which the plaintiff in a rectification case offers it as the basis upon which it is to act. As I have already said, the instrument which the plaintiff seeks to reform was entered into rather more than 33 years ago. At the time when the plaintiff entered into it, she was under age, and, I suppose, as she herself said, paid not A very much attention to income tax or the burden of income tax, which in 1907 was 9*d.* in the £ in respect of earned income and 1*s.* in the £ in respect of unearned income, with the right in a person who was liable to tax and whose income was limited in amount to certain relief from tax in respect of parts of his or her income when the income reached B certain limits.

From three letters written by Rothschild in June, 1907, before the date of the deed, it is clear, I think, that he himself had been trying to draft a deed by which provision was to be made for the plaintiff after their separation had taken place. The letters are those of June 23, 1907, C June 26, 1907, and June 27, 1907. What the documents which Rothschild had drafted contained nobody knows. The plaintiff has either destroyed them or lost them, and they are not forthcoming. This sentence occurs in Rothschild's letter of June 26, 1907 :

> There is a no necessity for you to consult about it for I have no wish to do you D out of anything.

Notwithstanding that expression of his wishes, the plaintiff disregarded his advice, and consulted one Pratt, since deceased, a solicitor's managing clerk, who prepared the deed in question. Apart from the plaintiff's oral testimony as to what passed between her and Rothschild more E than 33 years ago, there is no evidence whatever before the court as to the intentions of the parties to the deed in question at the moment of time when their signatures were put to it. In those circumstances, the burden which the plaintiff has taken upon her shoulders is, and must always be, very heavy indeed. I shall look at her oral evidence in F a moment. Counsel for the plaintiff has pressed upon me that I am forced into a position in which I must either accept the evidence of the plaintiff, in which case he has proved his case, or say that I disbelieve the plaintiff. If I took that course, as he says, there is an end of the plaintiff's case. I am quite satisfied that I am not put into that position. G I am not prepared to say that I have come to the conclusion that the plaintiff is an untruthful person. Indeed, I have no sound ground upon which I could reach that conclusion. She has given her evidence upon oath, and one is bound to think that a person who is giving evidence on oath is speaking as truthfully as she can. However, she is speaking H of conversations which took place, as I have said, 33 years ago. One may have a memory of a photographic kind which can retain the exact terms of a conversation which took place 33 years ago, but, if one has a memory of such a kind, I should have thought that one must also have had a memory which would have enabled one to say when, where, and in what circumstances, the conversation took place, and whether anybody, and, if so, who, was present when the conversation took place. In this particular case I have not a single detail as to when, where, why, or how the conversation which is the foundation of her case took place. Nor have I got any evidence as to whether or not anybody was present when it took place. Did it take place a week, or a month, or how long before the date of the deed of covenant ? Not one word is said by her in evidence. If she has a memory of the kind which enables her to depose with certainty to the exact words which were used 33 years ago, I should have thought that she would have been able to give evidence with regard to those matters. I find myself unable to say that the plaintiff's evidence has left me satisfied and without any fair or reasonable doubt that, in the course of the discussions which she had with Lord Rothschild, he said to her : "You are to have a sum of £550 free of tax," or "clear of tax," or, indeed, that the word "tax" was used in the course of the discussions at all. In arriving at that conclusion, I want it to be understood that I am not saying that I disbelieve the plaintiff, but that, by her evidence she has not satisfied me beyond fair or reasonable doubt, as she must do, that those words, or words to that effect, were used.

On that conclusion of fact, it seems to me that the case must fail, because the plaintiff has failed to prove any conversation between herself and Lord Rothschild from which I can infer that it was the concurrent intention of both down to July 5, 1907, when they signed the deed, that the annuity which he was to pay to her was to be an annuity of £550 free of tax, or free of all deductions of tax. However, supposing that that conclusion of fact which has been reached is not the right one, and that the word "tax" was used. The highwatermark of the case of counsel for the plaintiff is that I ought to find it proved as a fact that Lord Rothschild said to her : "You are to have £550 free of tax." Take those words, "£550 free of tax." What do they mean ? Do they mean that there is agreement as to the words which are to be used to give effect to the bargain they have made ? Counsel for the plaintiff agrees that, if those words had been put into a deed, they would not have had the effect of freeing the plaintiff from liability to income tax and of throwing the burden of the income tax upon the shoulders of Rothschild. He says, however, that it has been settled by two authorities. One was a decision of CLAUSON, J., in *Jervis* v. *Howle & Talke Colliery Co., Ltd.* (5), and the other, *Burroughes* v. *Abbott* (6). These cases decided that, if parties have agreed that a sum shall be paid free of tax, they do not mean what they have said, but they mean payment of such a sum as, after deduction of tax, will produce the specified sum. I am troubled about this. It is not necessary to decide it, but I am troubled about it very largely because I have had the pleasure and advantage of reading a most delightful and entertaining lecture by MACKINNON, L.J., which he calls "Accurate and clear expression." At the conclusion, he says :

> You may sometimes hear people who have made, or think they have made, an agreement, talk about "getting it put into legal form." Rightly understanding, they ought to mean "getting it expressed in perfectly clear language." And if

their own amateur effort is in truth a real agreement, no further process is necessary. What usually is necessary is to help them to make, not merely to express, an agreement.

If these two people had, as they thought, come to an agreement, had agreed with one another that Lord Rothschild should pay the plaintiff £550 per annum free of tax, and had gone to a lawyer skilled in his art for the purpose of getting him to put into legal shape what they thought was their agreement, what would he have done ? He could have put in the document the words upon which they had agreed. Possibly then effect would not have been given to what they thought that they had agreed. They meant something by what they had said. If those words were not inserted, a lawyer, knowing the authorities in point, would have said to the plaintiff, whose only income is £550 : " Do you want to have £550 and no more, or do you want to have such sum as, after deducting income tax, will produce £550 ? Because in the latter case, having regard to your income, and since you are entitled to reliefs, you will be able to get back from the Inland Revenue some of the tax which has been deducted from the £550 which Lord Rothschild has paid in respect of the clear £550, and you will then have in your hands more than £550 spending money." To that Lord Rothschild might well have said : " No. I did not agree to that." Then the lawyer might have said : " The alternative is to have the formula which is suggested by the Court of Appeal in their decision in *Re Maclennan, Few* v. *Byrne* (7)." That is a different form, and the real truth, I think, would be that, when these parties—unless the words they had agreed upon were put into the agreement—went to a lawyer to advise them as to what they were to do, they would find that they had not come to an agreement, and, if one had not come to an agreement, one cannot re-form. That is my own view. It is a point which was not argued in *Jervis's* case (5), but which was argued in *Burroughes* v. *Abbott* (6), and was not considered. It seems to me an insuperable difficulty in the way of the plaintiff, even if I were to find that she had proved the highwatermark of her case. Moreover, as I say, I am not finding that the plaintiff is a lying witness. I am saying that she has not discharged the very heavy burden which the lapse of time inevitably throws upon her shoulders of satisfying me beyond fair and reasonable doubt that, in the course of the discussions which took place between her and Lord Rothschild 33 years ago, the word " tax " was referred to. On the case as it stands, in my judgment, the plaintiff having failed, the action must be dismissed with costs.

Action dismissed with costs.

Solicitors : *J. D. Langton & Passmore* (for the plaintiff) ; *Dawes & Sons* (for the defendants).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

DUNCAN *v.* CAMMELL LAIRD & CO., LTD.

[COURT OF APPEAL (MacKinnon, Goddard and du Parcq, L.JJ.), **March 13, 1941.**]

Discovery—Objection to produce documents—Privilege—Production contrary to public interest—Practice of court—R.S.C., Ord. 31, r. 19 (*a*) (2).

The appellants asked for an order for the production of certain documents. The First Lord of the Admiralty had made an affidavit in which he stated that such production would be contrary to the public interest. It was contended that the court should have the documents produced and exercise its judgment upon the matter :—

HELD : the affidavit by the First Lord of the Admiralty was conclusive, and, in such a case, the court should not order the production of the documents for its inspection. An order for production was, therefore, refused.

[**EDITORIAL NOTE.** The court has held that, if it is not a binding rule of law for the court to refuse to inspect the documents in such a case, it is certainly not the practice to do so. An affidavit by the Minister concerned stating that production is contrary to the public interest is conclusive. At the same time, the Court of Appeal has said that this is a matter upon which a clear statement of the law by the highest tribunal might be sought with advantage.

AS TO PRODUCTION OF DOCUMENTS WHERE DISCLOSURE CONTRARY TO THE PUBLIC INTEREST, see HALSBURY, Hailsham Edn., Vol. 18, pp. 397, 398, para. 479 ; and FOR CASES, see DIGEST, Vol. 18, pp. 166-169, Nos. 1202-1223.]

Cases referred to :

(1) *Beatson* v. *Skene* (1860), 5 H. & N. 838 ; 22 Digest 392, *4013* ; 29 L.J.Ex. 430 ; 2 L.T. 378.

(2) *Hennessy* v. *Wright* (1888), 21 Q.B.D. 509 ; 18 Digest 168, *1210* ; 57 L.J. Q.B. 530 ; 59 L.T. 323.

(3) *Hughes* v. *Vargas* (1893), 9 T.L.R. 551 ; 22 Digest 393, *4015*.

(4) *Ankin* v. *London & North Eastern Ry. Co.*, [1930] 1 K.B. 527 ; Digest Supp. ; 99 L.J.K.B. 293 ; 142 L.T. 368.

(5) *Robinson* v. *South Australia State (No. 2)*, [1931] A.C. 704 ; Digest Supp. ; 100 L.J.P.C. 183 ; 145 L.T. 408.

(6) *West* v. *West* (1911), 27 T.L.R. 476 ; 22 Digest 395, *4032*.

(7) *Admiralty Lords Comrs.* v. *Aberdeen Steam Trawling & Fishing Co., Ltd.*, [1909] S.C. 335 ; 22 Digest 94, case *637ii*.

(8) *Asiatic Petroleum Co., Ltd.* v. *Anglo Persian Oil Co., Ltd.*, [1916] 1 K.B. 822 ; 18 Digest 166, *1202* ; 85 L.J.K.B. 1075 ; 114 L.T. 645.

APPEAL by the plaintiffs from an order of HILBERY, J., dated Feb. 21, 1941. The facts are fully set out in the judgment of MACKINNON, L.J.

H. J. Wallington, K.C., and *F. D. L. McIntyre* for the appellants.

R. Marven Everett for the respondents.

Wallington, K.C. : The question is whether or not the court should look at the documents and decide for itself whether or not the claim for privilege is justified. In *Ankin* v. *London & North Eastern Ry. Co.* (4), it was stated that it was the practice for the courts to accept the statement of a Minister of the Crown that it would be against public interest to produce documents. SCRUTTON, L.J., has there stated the rule too highly. The court should look at the documents to see if the First Lord has exercised his mind upon them or has taken advice in a general way. This is a case in which, to all intents and purposes, the Admiralty is a party. The proof of the plaintiff's case must rest largely upon the documents and upon the evidence as to the condition of the ship at the time. The practice is one which does not exclude the right of the court to keep control over its own procedure. In *Robinson* v. *South Australia State* (*No. 2*) (5), Lord Blanesburgh goes fully into the principles regulating this class of case. In the present case, the court might make some order which would allow a limited inspection of these documents. The plaintiff desires to get such inspection as will enable the case to be proceeded with. There will be no harm to the public interest if the plaintiff's legal advisers get inspection of these documents. If necessary, the documents could be looked at in chambers, with a limitation upon the people who might be present. [Counsel referred to *Asiatic Petroleum Co. Ltd.* v. *Anglo-Persian Oil Co., Ltd.* (8).]

McIntyre, following on the same side : In *Robinson* v. *South Australia State* (*No. 2*) (5), Lord Blanesburgh said that privilege could hardly be asserted in relation to documents which had already been published. Extracts from these documents have already been published. The documents required for the purpose of preparing the plaintiffs' case are perfectly plain documents and no one could possibly object to their being looked at on the ground of technicalities. If *Ankin* v. *London & North Eastern Ry. Co.* (4) is the law, it renders R.S.C. Ord. 31, r. 19 (*a*) (2), ineffective. In *Robinson* v. *South Australia State* (*No. 2*) (5), Lord Blanesburgh said that an overwhelming necessity must be shown before the jurisdiction of the court can be taken away. No such necessity has been shown here.

Everett : The law to-day remains what it has been since at least 1860. If a responsible Minister of the Crown tells the court that, in the public interest, a document should not be produced, that is an end of the matter. The arguments which have been addressed to the court on the question of hardship or on the nature of the documents are irrelevant. Those matters were dealt with by Pollock, C.B., in *Beatson* v. *Skene* (1), when he said that the interest of the state must be considered paramount to the need of the suitor in a court of justice. This case was followed by *Hughes* v. *Vargas* (3) and by *Hennessy* v. *Wright* (2). [He was stopped by the court.]

MacKinnon, L.J. : This is an appeal from Hilbery, J., affirming the decision of the master. The action is brought against Cammell Laird & Co. to recover damages for the loss of life of some of the victims of the Thetis disaster. At one stage in these proceedings, the defendants in due course had to make an affidavit of documents. In the course of that affidavit, the secretary of the defendant company said that the company objected to producing the documents, more particularly under para. 6, because they had been acquired and held by them subject to the directions of the First Lord of the Admiralty. When the attention of the First Lord had been drawn to the nature and contents of the documents, the Treasury Solicitor directed the defendant company not to produce the documents and to object to the production thereof except under the order of the court. He did this on the ground of privilege.

A An affidavit was made by Mr. Alexander, the First Lord of the Admiralty, in which he said:

> . . . all the said documents were considered by me with the assistance of my technical advisers and I have formed the opinion that it would be injurious to the public interests that any of the said documents should be disclosed to any person . . . on the above grounds on behalf of the Lords Commissioners I object to the said documents or any of their contents being disclosed or exhibited by the plaintiffs B or either of them or by anyone on their behalf in this action.

An application was made to the master for an order that the defendants, Cammell Laird & Co. should give inspection with regard to the documents under para. 6 of the second part of the first schedule, and should permit the plaintiffs to peruse the same and take copies thereof C at such place and time as should be directed by the order. The documents referred to are all set out in the first schedule of the affidavit of documents. Upon these facts and materials, the master refused to make the order, and, on appeal, Hilbery, J., affirmed the decision of the master. An appeal is now brought to this court for an order that that D order of Hilbery, J., whereby he refused to make an order, may be rescinded, and that it may be ordered that the plaintiffs be at liberty to inspect the documents referred to in the schedule.

Counsel for the appellants has contended that we ought not entirely to disregard the affidavit of the First Lord of the Admiralty, but he has E suggested that the proper course for this court to adopt would be to have the documents produced to us and to exercise our judgment as to whether, having regard to the nature of the documents, effect should be given to this objection of the First Lord, or whether we should overrule that objection and order production of the documents to the F plaintiffs. In my view, by the settled practice of this court, if not by the rule of law, it is not open to us—or, if it is theoretically open to us to make that alternative order, by the practice of this court it is not proper—to adopt that method. The rule, I think, was settled at least as early as 1860, if not earlier, in *Beatson* v. *Skene* (1), and this has G been followed by *Hennessy* v. *Wright* (2) and *Hughes* v. *Vargas* (3), and very notably in *Ankin* v. *London & North Eastern Ry. Co.* (4). In *Ankin's* case (4) the rule is stated by Scrutton, L.J., in these terms, at p. 533:

> It is the practice of the English courts to accept the statement of one of His H Majesty's Ministers that production of a particular document would be against the public interest even though the court may doubt whether any harm would be done by producing it. I have been informed on very high authority that the practice in Scotland is different; that there the judge looks at the document and orders it to be produced if he does not agree with the Minister's reasons for considering its production to be against the public interest.

In that case, Scrutton, L.J., does not state who was his informant, nor what was the authority, and, in the Privy Council proceedings which followed in 1931, Lord Thankerton, by an interlocutory observation, at once questioned its correctness. It would further appear from an opinion of Lord Dunedin, referred to during the argument by my brother du Parcq, L.J., that Scrutton, L.J., must have been under some misapprehension as to the practice in Scotland, because the decision of Lord Dunedin seemed to be entirely in agreement with the views stated just before by Scrutton, L.J., in the passage I have read.

I think that, following upon these authorities, Hilbery, J., and the master were perfectly correct in deciding that no order for the production of these documents should be made, and that no alternative order for the production of the documents to the court, so that the court might exercise its opinion on the question of whether or not they ought to be produced, should be made. We were pressed by reference to *Robinson* v. *South Australia State* (*No. 2*) (5). I think that the result of that and other cases is probably that, theoretically, the court has a right to look at the documents, notwithstanding the claim made by the Minister, in order to form its own view as to the validity of that claim, but, by the practice of the court, I think that that power would be exercised only rarely, as it was rarely exercised in *Robinson* v. *South Australia State* (*No. 2*) (5), because that was a very special case. First, it was a case where the state was itself the defendant in the action. Secondly, it was an ordinary claim arising out of the commercial and trading activities of the defendants. Thirdly, the claim for privilege by the Minister was not made under oath or in any proper form. Apart from such an exceptional case—exceptional for reasons like that—I think that the rule or practice of law has been uniformly laid down, as I pointed out, since 1860 until the judgment of Scrutton, L.J., in *Ankin's* case (4) in 1930, and the whole current of authority is to the effect which I have stated, and as was stated by Scrutton, L.J., in *Ankin's* case (4). That being so, I think that the decision of the judge was right, and that this appeal should be dismissed with costs.

Goddard, L.J., : I agree. I think that the authorities, which are numerous, oblige this court to hold that, where the head of a department claims privilege for production of documents, the court must give effect to that claim. Whether or not there are any exceptions to the rule is not clear. I think that, so far as this court is concerned, the rule is binding. It may be that it is desirable at some time to have the matter considered by the House of Lords, which would then give an authoritative and final decision on the matter.

One question, on which I am not altogether clear, was raised. If a Minister sets up a claim for privilege, is it open to the court to allow him to be cross-examined as to the ground on which he claims protection? I can see that there may be grave objections to that. At the same time in *West* v. *West* (6), the Lord Chamberlain, who was called as a witness to prove the publication of certain slanders of which the plaintiff was complaining, objected to answering the questions, on the ground that it was in the interests of the public that he should refuse to give evidence. Darling, J., upheld his view, and the decision was upheld in the Court of Appeal. Vaughan Williams, J., did indicate in his judgment that a judge could permit questions, and could put them himself, so that he might be satisfied on the objection, but I rather think that the ground of the judge's decision was that, having regard to the nature of the case—it was a communication made to the Lord Chamberlain—the court had a right to be satisfied that the communication to the Lord Chamberlain was made in his official capacity, and not as an individual. I do not think that the case goes beyond that, I think that the cases show that, if the objection is taken by the Minister. that objection, so far as the court is concerned, is official, and cannot be inquired into.

du Parcq, L.J.: I agree. I think undoubtedly difficult cases may arise, especially where in fact the Crown or department is a litigant, but, as to the proper decision in the present case, I have no doubt whatever. In *Admiralty Lords Comrs.* v. *Aberdeen Steam Trawling & Fishing Co., Ltd.* (7), to which reference was made during the argument, the Admiralty were suing. That aspect of the matter is dealt with by the Lord President, Lord Dunedin, at p. 341, where, for the reasons he gave, he said that it made no real difference. It may well be that it does make no real difference, but, as I say, the case may at any rate appear to be more difficult when the public department is suing and at the same time refusing to produce documents which are apparently material, on the ground that it would be injurious to the public interest to do so. Here, however, there is no such complication. This is a dispute between two parties who are private persons, and it is a simple case where the only question is whether documents should be produced when their production, it is said, would be contrary to the public interest. Therefore, there is no question here of privilege of the parties in the ordinary sense, and I can imagine a case where a party was quite willing to produce a document but was told by the Minister of the Crown concerned that the document must not be produced, and he would then, whatever the rights of the matter might be, certainly only be doing his duty as a citizen if he declined to produce it. Not only the observations of the Lord President, Lord Dunedin, but also those of the other members of the court in *Admiralty Lords Comrs.* v. *Aberdeen Steam Trawling & Fishing Co., Ltd.* (7) seem to show beyond doubt that the rule in Scotland is precisely the same as that in this country.

I only want to add a word or two about the Rules of the Supreme Court because counsel for the appellants relied very much on R.S.C., Ord. 31, r. 19 (*a*) (2). It is quite true that that rule says that, on an application for an order for inspection, if privilege is claimed for any document, it shall be lawful for the court or the judge to inspect the document for the purpose of deciding the validity of the claim of privilege, and it is also true, I think, that precisely the same words occur in the law in Australia, and were held in the Privy Council to cover a case where the refusal to produce a document was based on the ground that its production would be injurious to public policy. In *Robinson's* case (5), it was one of the parties to the litigation, I think, who refused to produce the document. It was the state of South Australia which was the defendant. In a case such as the present one, although I do not wish to offer any conclusive opinion, I doubt whether the refusal to produce is a claim of privilege within the meaning of that rule, and, for myself, I should like to reserve that question. I do not think that it is finally decided by *Robinson's* case (5), but, even if it were, I should still wish to keep the point open for further consideration.

However, assuming that R.S.C., Ord. 31, r. 19 (*a*) (2), does cover a case like this, I think that, where the Crown is in no sense a party, and where a responsible Minister of the Crown or head of a department states on oath that the production by one of the litigants of a document would be injurious to the public interest, there can be very few cases in which it would be the proper exercise of the judge's discretion for him to look at the document and decide himself whether or not it ought to be produced, or, in other words, decide, on what must necessarily in most cases be very inadequate evidence, whether or not the Minister of the Crown was right in the conclusion at which he had arrived on a matter as to which the Minister above all people is responsible. I might add that, if any attempt is made to use R.S.C., Ord. 31, r 19 (*a*) (2), as laying down a general rule that in all cases of this kind the judge may look at the documents, one may just as well argue that, under R.S.C., Ord. 31, r. 14, which is the general rule enabling the court to order the production of documents, the judge may order any document in his discretion to be produced, without regard to the very well-settled rules which are to be found, not in the Rules of the Supreme Court, but in the decisions of the courts, subject to which those rules have been made. I think that this is a plain case, and I agree that the appeal should be dismissed.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *Evill & Coleman* (for the plaintiffs); *Carpenters*, agents for *Laces & Co.*, Liverpool (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

THE PRINS KNUD.

[Probate, Divorce and Admiralty Division (Lord Merriman, P.), **February 11, 1941.**]

Prize Law—Seizure of ship of enemy-occupied country—Claim against ship for salvage—Condemnation delayed—Rights of salvors.

In April, 1940, upon the invasion of Denmark, a Danish vessel was seized as prize. She was later requisitioned by the British Government who gave an undertaking to pay into court the appraised value of the ship at such time as the court should declare that it or some part of it was required for payment out of court. The claimants had rendered salvage services to the Danish ship and in July, 1940, obtained an award in the Admiralty Court of £6,500 in respect of such services. They filed a claim in the prize proceedings asking that an amount sufficient to satisfy their claim should be paid into court, and asked the court to order that the captors should forthwith proceed to adjudication. The British Government had given assurances that Danish ships seized as prize would be returned to their owners after the war and, in pursuance of that policy, proceedings for condemnation were not proceeded with :—

Held : in the exercise of its discretion, the court should refuse to make the order asked. The owners of the ship were entitled to be heard on the question whether the salvage award was enforceable in prize, and the rights of the claimants could not prevail over the interest of the realm which was stated by the Government to require the postponement of the adjudication. As the ship was technically an enemy vessel, there was a real issue to be tried and the British Government had a right to seize and requisition the ship.

[**EDITORIAL NOTE.** The owners in the present case did not contest the award of salvage money to the claimants, but only the enforceability of such an award in prize. The Government, having determined to hand back this Danish ship at the end of the war to its Danish owners, were not anxious to do more than was necessary to protect their interests in the ship which they had requisitioned. In the view of the court, the interests of all parties were sufficiently safeguarded by an undertaking by the Crown that the ship's release would not be asked for except on notice to the owners.

As to Requisitioning of Captured Ship, see HALSBURY, Hailsham Edn., Vol. 26, pp. 217, 218, para. 493 ; and for Cases, see DIGEST, Vol. 37, pp. 687, 688, Nos. 1557-1568.]

Cases referred to :

(1) *The Zamora*, [1916] 2 A.C. 77 ; 37 Digest 652, *1071* ; 85 L.J.P. 89 ; 114 L.T. 626.

(2) *The Chile*, [1914] P. 212 ; 37 Digest 643, *956* ; 84 L.J.P. 1 ; 112 L.T. 248.

Summons by the claimants, France, Fenwick, Tyne & Wear Co., Ltd. the owners of the three tugs Hendon, Wearmouth and Corsair. These tugs had rendered salvage services and an award of £6,500 had been obtained in the Admiralty Court. The claimants sought to enforce the award in these prize proceedings subsequently taken against the salved ship. The claimants asked that an order be made that :

> . . . His Majesty's Procurator-General or other proper officer of the Crown do forthwith proceed to adjudication in this cause instituted for the condemnation of [the Prins Knud, a Danish vessel, and her cargo] or such other order as to the judge may seem fit so as to enable the claims [of the claimant company] to be adjudicated upon.

G. St.C. Pilcher, K.C., and *Waldo Porges* for the claimants.

The Attorney-General (*Rt. Hon. Sir Donald Somervell, K. C.*) and *J. V. Nesbitt* for the Procurator-General.

LORD MERRIMAN, P.: In this case, it is necessary to go back to the circumstances in which the claimants' claim arises. Before Denmark was invaded in April, 1940, the claimants had rendered salvage services to a Danish vessel, the Prins Knud. The services were protracted. Indeed, I am told that one tug was engaged throughout the best part of two months. There is no question but that the tugs rendered valuable services, for, when the action came on before LANGTON, J., on July 8, 1940, he awarded £6,500 and costs, the bulk of which went to the owners, master and crew of the Hendon.

Meanwhile, on Apr. 11, 1940—the day after the invasion of Denmark—the Prins Knud was arrested in prize. On Apr. 12, the writ in prize was issued and the arrest withdrawn. In pursuance of the appropriate procedure laid down in *The Zamora* (1), and on proper evidence, as I am informed, the registrar permitted the Crown to requisition this ship on Apr. 20, 1940. In connection with that requisition, and in accordance with Prize Court Rules, Ord. 29, r. 5, an undertaking in writing was given by the proper officer of the Crown for payment into court on behalf of the Crown of the appraised value of the ship, or an amount fixed under Prize Court Rules, Ord. 29, r. 4:

> . . . at such time or times as the court shall declare by order that the same or any part thereof is required for the purpose of payment out of court.

On Aug. 29, 1940, the claimants entered an appearance in respect of the ship only, and on Nov. 4 they formulated their claim in respect of the salvage services which I have mentioned. The material part of the claim on which stress is laid is as follows:

> . . . for an order that an amount sufficient to satisfy the aforesaid claims be paid into court by the Crown in accordance with the undertaking [above mentioned] and for such further or other relief as to the court may seem just . . . for payment out to the claimants of such sum as may be found due to them and costs.

As the Attorney-General has pointed out, these claimants are not the only people who in one form or another have claims against Danish subjects which accrued before Denmark became an enemy country, and who are anxious to get payment for these claims in some way or another notwithstanding the fact that their debtor is now an enemy. However, I am really concerned with this only in so far as it affects this claim in Prize. On the face of it, it does seem rather hard, on the one hand, that a subsidiary claimant should be entitled to come forward and, so to speak, take control of the suit and insist that both the Crown and the court shall proceed forwith to adjudication, whatever other considerations may be present, so that these particular claimants shall get their rights, whatever they may be. On the other hand, it also seems rather hard, on the face of it ,that the rights of these claimants,whatever they may be, should be postponed for determination and satisfaction to the end of the war. For this reason, it is necessary to examine the circumstances on which the Crown relies.

At the hearing a typewritten document was put in on behalf of the Procurator-General and the Attorney-General has formally adopted it as representing a correct statement of the position of His Majesty's government. It ran as follows:

> (1) After the German occupation of Denmark assurances were given on behalf of His Majesty's Government that, speaking generally, Danish vessels seized as prize would be handed back to their owners after the war. (2) Because of these assurances the present policy of His Majesty's government is to refrain from seeking decrees of condemnation of Danish vessels seized as prize. (3) In order that the claims of British creditors (brokers, salvors, necessaries men, etc.) should be safeguarded when the time came for the return to their owners of Danish vessels, a public announcement was made that such claims should be registered with the Accountant-General of the Ministry of Shipping. (4) This particular claim has been registered at the Ministry.

As has been emphasised, that statement of the present intentions of His Majesty's government does not represent any bargain made with any owners or with the Danish government, but is a unilateral statement of the intentions of the British government. It is insisted—and it seems to me to be quite obvious that this is so—that it is a statement dictated by reasons of high policy, and it really does not require very much imagination to see what underlies so important a declaration of intention as this. Therefore, I do not propose, and I do not think it is my business, to examine the matter any further. I accept the statement of the Attorney-General that this policy is a matter of high interest to the realm.

Both at the hearing in chambers and at the hearing in court, I was assured by the Attorney-General (i) that, in reference to this particular case—and, indeed, in reference to all such cases covered by the statement of policy—His Majesty's government undertakes that there will be no release to owners without application to the Prize Court, (ii) that no such release will be made except on proper notice to claimants, such as the present claimants, who have registered their claims, and (iii) that the same undertaking applied to any sum brought into court in lieu of the ship in the event of her loss under the undertaking given under the rule to which I have already alluded. Thus, there should be no doubt about the specific application of these undertakings. They were all given in reference to the specific claim of the present claimants. During the argument in chambers, I suggested—and the undertaking has been given again here—that it was desirable that, if the ship should be lost, and therefore represented only by her appraised value, prompt notification should be given to the claimants, so that, if they so desired, they could apply on the undertaking under the rule for payment into court of the appraised value, and might pursue their claim against the proceeds. An undertaking that such notification would be given promptly was given. I suggested that because it is obvious that, though there may be difficulties about proceeding to adjudication with regard to the condemnation of the ship as a whole, it might conceivably be more possible to deal with the proceeds—or, rather, the claim of the claimants against the proceeds—independently of the condemnation or release of the ship. It was because the claimants were not satisfied by those undertakings that, as I say, the matter was adjourned into court.

The Attorney-General has reserved the point that, under the provisions A of the Prize Court Rules, Ord. 5, r. 4, on which the application is based, outside claimants of this kind have really no *locus standi* except where no writ has been issued. However, he was inclined to agree, I think, that the point was to some extent academic, because he would not have been prepared to deny the court inherent jurisdiction to deal with the B situation of claimants who had actually appeared to a writ, as in this case, and no time was spent on that point. It was also assumed for the purpose of the argument—though it must not be taken to be decided one way or the other, for the point may be highly controversial—that the present claimants have a claim in Prize. I mention that specifically C because, notice having been given to the owners after the matter was before me in chambers, the solicitors now in court have intimated to me that, though they have nothing to say about the enforcement of the award in civil proceedings—there is going to be no contention that the award is not a perfectly good one, or for the right amount—they wish on D behalf of the owners to contest its enforcement in Prize. This emphasises the point made by the Attorney-General that on any view—whether one is dealing with the ship itself or with the proceeds of the ship—it would be wrong to dispose finally of the claim of the claimants at a time when the owners have no opportunity of being heard. In fact, they E had no opportunity of being heard before LANGTON, J., but that point now appears to be academic.

Although I have some sympathy with the claimants, I am bound to say that I think that I should be doing wrong if I made an order in their interests compelling the Crown to bring the case to adjudication when F I am told, on the authority of the Attorney-General, that these considerations of high policy have induced His Majesty's government to say that, as at present advised, they do not intend to proceed to seek condemnation of Danish ships. I think that high considerations of the interests of the realm must take precedence of such comparatively G minor inconvenience as may result from whatever postponement of the decision of this issue is involved in awaiting the termination of hostilities. If I were to hold that the interest of this, that or the other claimant overrides these high considerations in one case, I should have to hold it in all, and that would be in effect to reverse the decision on H policy at which the government has arrived.

At one time I was in some doubt as to whether or not the action taken to requisition the Prins Knud, while at the same time saying that there was no intention to seek condemnation, was consistent with the decision of the Privy Council in *The Zamora* (1). The Attorney-General has satisfied me that there is really no conflict between the two. Put shortly, the point in *The Zamora* (1) was that there was to be no requisition merely by executive order. It was to be requisition in Prize, and in advance of condemnation only on a judicial decision which involved that in the Prize suit there was some real question to be fought, so that—and I emphasise the words " so that "—it would be improper to order immediate release.

There can be really no two opinions about there being a question to be fought in this case if the government are minded to fight it, because the Prins Knud is, beyond doubt, within the meaning of Prize law, an enemy vessel. The mere fact that the government have expressed a unilateral intention of taking a course which will not involve condemnation ultimately does not seem to me really to affect the matter one way or the other. If it were insisted that this matter should come to a head in Prize, I think that there would be very little doubt what the result would be. At any rate, to put it at its lowest, it is quite certain that there would be such a question as to what the result would be that no immediate release could be ordered. Therefore, I think that there is no conflict between this case and the judgment in *The Zamora* (1), and, as I say, I think that there is every reason of public interest why this question should be allowed, as the government have announced that it should be allowed, to stand over until the end of the war. If that is so, it is impossible for me to order that the whole case should come on for adjudication. However, one can very well see that, short of that, there might be very great convenience to the claimants in getting at least a declaration of their rights, and I made it quite plain to counsel for the claimants that, if he asked for that, I should be inclined to make such an order, though it is not, of course, what he is asking for on this summons. I am bound to confess that I was a little impressed by what the Attorney-General said on the point. Although he did not dispute that the court had jurisdiction to do it, he did point out that in any case payment would not be made before the end of the war, and would be made only after the owners had had an opportunity of being heard, as, apparently, they wished to be heard. Therefore, there was really no advantage in having the rights determined now, though the actual result in way of payment would be postponed. However, if the claimants had pressed for it, I should have been inclined to let them have a decision one way or the other on the question of right here and now. However, that offer was formally refused. Their money, and nothing less than their money, is what the claimants want, so that there is no more to be said about that.

I have used the phrase " the comparatively minor inconvenience " occasioned by postponement. In any individual case, the inconvenience may be greater or less, but I am thinking of it not so much from the individual point of view as from that of the general inconvenience to be sustained by claimants generally in the like case. In my opinion, so far as their rights are concerned, they are completely safeguarded by the undertakings which the Attorney-General has reaffirmed in this court before me. The release will take place in Prize, and in Prize only, and on notice. That means that, if the claimants can then do so, they may establish their claim and ensure that release occurs only with such provisions as the court thinks right to safeguard their claim. I am not prejudging the matter in any way. The claimants will have their full right and full opportunity of enforcing and safeguarding their claims at that time. In this particular case, the undertaking still stands to give prompt notification of the loss of the ship, so that this application for payment into court and adjudication, at any rate, of their claim may then be renewed.

In my opinion, after having heard this matter argued twice, I do not think that in the exercise of my discretion I ought to make any other order, and I think that the claimants ought to be satisfied with the undertakings which have been given. However, as on the previous occasion, although I make no order on this summons now, I safeguard the right of the claimants to come back, should the ship be lost and they think that any application can profitably be made in those circumstances, by giving liberty to apply.

Solicitors : *Middleton, Lewis & Clarke*, agents for *Middleton & Co.*, Sunderland (for the claimants) ; *Treasury Solicitor* (for the Procurator-General).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

TURNER *v.* STELLA BOND, LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., MacKinnon and Goddard, L.JJ.), **March 21, 1941.**]

Emergency Legislation—Landlord and tenant—War damage—Rent payable in advance—Notice of disclaimer followed by notice to avoid disclaimer—Liability for rent after notice of disclaimer—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *s.* 11.

Premises were let on lease on the terms, *inter alia*, that the rent was to be paid quarterly in advance. The rent due on Sept. 29, 1940, was not paid punctually, and on the night of Nov. 6-7 the premises were damaged by blast from a bomb. On Nov. 9, 1940, the lessee served a notice of disclaimer upon the landlord. On Nov. 25, the lessee paid the amount of rent due to the date of the notice of disclaimer. On Dec. 4, 1940, the landlord served a notice to avoid disclaimer. The landlord claimed the balance of rent for the quarter on the ground that it was due and payable before the service of the notice of disclaimer :

Held : (i) the effect of the Landlord and Tenant (War Damage) Act, 1939, s. 11 (1) (*b*) was to insert in the covenant to pay rent a proviso that no rent should be payable in respect of the period commencing at the date of the service of the notice of disclaimer and ending on the date on which the premises were rendered fit for occupation. The tenant, therefore, was not liable to pay rent in respect of that period, even though the rent was payable in advance.

(ii) *per* MacKinnon and Goddard, L.JJ. : if the rent had been paid on the due date, the tenant could have recovered back the proportion paid in respect of the above period.

[**EDITORIAL NOTE.** It has been held that rent payable in advance is not apportionable on re-entry during the period for which it is paid : *Ellis* v. *Rowbotham* [1900] 1 Q.B. 740 ; 31 Digest 263, *4042*. That decision, which was a decision of the Court of Appeal, is based purely on the construction of the Apportionment Act, 1870, which was held not to apply where the event calling for apportionment happens after the payment sought to be apportioned has become payable. The decision here in no way conflicts with that authority, since it is based purely on the construction of the 1939 Act, and not on any question of apportionment, but upon the insertion by statute of a proviso in the lease. It will be noted that Sir Wilfrid Greene, M.R., refrains from deciding whether, if the rent had been paid on the due date, it could be recovered back from the landlord, but the other members of the court seem clear on the point. The facts of the present case were such that no decision on the point was necessary and what has been said can properly be treated as *obiter*. The matter, however, has often arisen in practice, and for the present, parties may prefer to act in accordance with the *dicta* herein. The enforcement of the repayment must, however, be based upon an apportionment, and to this extent the decisions would appear to be conflicting.

For the Landlord and Tenant (War Damage) Act, 1939, s. 11, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, pp. 993, 994.]

Case referred to :

(1) *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488 ; 12 Digest 610, *5042* ; 60 L.J.Q.B. 734 ; 65 L.T. 286.

Appeal by the defendants from an order of His Honour Judge Davis sitting at the Bloomsbury County Court, dated Jan. 16, 1941. The facts are fully set out in the judgment of Sir Wilfrid Greene, M.R.

H. G. Garland for the appellants.

B. L. A. O'Malley for the respondent.

Garland : The appeal raises the question as to whether or not rent is payable from the date of the notice of disclaimer until the premises are rendered fit where the rent is payable in advance and rent has accrued due under the lease before the date of damage to the premises. The county court judge has held that the Landlord and Tenant (War Damage) Act, 1939, s. 11 (1) (*b*), is not applicable when the rent is payable in advance. It is conceded that the rent was due and payable on Sept. 29, 1940. The judge decided that the rent was payable whether the premises were fit or unfit. On the plain words of the Act, a notice of disclaimer having been served, no rent is payable until the premises are rendered fit. On the construction of sect. 11, it is not open to a landlord in an action for rent, to say that the premises are fit. If the rent had actually been paid, it could be recovered by the tenant as money paid on a consideration which had failed. However, it is not necessary for my case to argue that point. On Nov. 25, 1940, the sum of £32 15*s*. rent was paid to the landlord by the lessee, being the rent up to the date of the notice of disclaimer reckoned from day to day. A B C

O'Malley : Rent accrued due on Sept. 29. If the plaintiff had sued at once, and had obtained judgment, the rent would have merged in the judgment debt, and the words of sect. 11 would no longer apply. After the notice of disclaimer had been served, the provisions of sect. 8 applied. That means that, unless a notice to avoid disclaimer is served within a month, all rights of the tenant in the premises become extinguished. That means that rent payable in advance can be recovered by the landlord. Where a notice to avoid disclaimer has not been given, the covenant to pay rent in advance can be enforced. Where, however, a notice to avoid disclaimer has in fact been given, the lease has effect subject to certain modifications contained in sect. 11. It is only with regard to modification (*c*) in sect. 11 that any difficulty arises with regard to the word "modification." In its ordinary application, the word has no significance as regards modification (*a*) and modification (*b*). The landlord must be able to recover the rent in respect of the quarter in which the damage has occurred, if effect is to be given to both clauses. In interpreting this Act, the interests of the landlord should be safeguarded when the rent has already accrued due. D E F G

Sir Wilfrid Greene, M.R. : In this case, the county court judge delivered a most careful judgment, which I have considered with the care which it deserves, but, upon the only point with which he dealt, I find myself unable to agree with him. The question, shortly stated, is whether the proportion of the rent payable under a lease which became due on Sept. 29 in respect of the ensuing quarter referable to the period between the service of the notice of disclaimer and the end of that quarter can be claimed by the landlord. The notice of disclaimer, which was served H on Nov. 9, was followed by a notice to avoid disclaimer served on Dec. 4, just before the expiration of the period of one month allowed by the statute for service of such a notice. The result of that situation was that the Landlord and Tenant (War Damage) Act, 1939, s. 11, came into operation. That section provides by subsect. (1) that, where a notice to avoid disclaimer is served, the notice of disclaimer shall be of no effect :

> . . . and . . . the lease to which it relates shall have effect subject to the following modifications . . .

Modification (*a*) provides that a covenant by the landlord to render the premises fit shall be implied in the lease. Modification (*b*) does not in terms direct the implication of any terms in the lease. It merely provides as follows :

> Subject to the powers of the court under the next following paragraph, no rent shall be payable by the tenant under the lease in respect of the period beginning with the date of the service of the notice of disclaimer and ending with the date on which the land is rendered fit.

Modification (*c*) gives certain powers to the court, but I need not go into that. The county court judge has read the section, so far as modification (*b*) is concerned, as directing the insertion in the lease of a statutory provision in the same way as, under modification (*a*), there is a statutory covenant implied in the lease. The effect of that, he said, was to make applicable the rule of construction that where, in the same document, there are two clauses which, literally read, may be inconsistent, those clauses must, as far as possible, be reconciled and effect given to both. I doubt whether the effect of modification (*b*) is what the county court judge thought that it was. It seems to me that it may well be regarded, not as the implication of a term in the lease, but as an overriding statutory provision liberating the tenant from a contractual obligation. It is true that the words " subject to the following modification " may point in the other direction, but, when I look at modification (*c*), which gives certain powers to the court, I have great difficulty in reading that, at any rate, as a statutory addition to the contract between the parties. However that may be (and I do not find it necessary to express any concluded opinion upon it), adopting the county court judge's method of approach, I have to ask myself what the effect of the lease is when it is modified by the force of this provision of the statute. It seems to me that that can best be shown by taking modification (*b*) and moulding it to meet the precise facts of the present case. On that basis, it must be treated as a proviso to the covenant to pay rent. In its application to the relevant facts of this case, the covenant to pay rent was a covenant to pay on Sept. 29 in advance one quarter's rent in respect of the quarter ending Dec. 25, and to that must be added, in accordance with sect. 11 (1) (*b*), words to the following effect : " Provided always that no rent shall be payable by the tenant under this covenant in respect of the period beginning on Nov. 9, 1940, and ending on the date on which the land is rendered fit." What effect is to be given to a covenant of that nature, qualified by that proviso? It seems to me that the proper effect to be given to it is that, notwithstanding the covenant to pay in advance, in the events which have happened, that covenant is to be cut down, and the tenant is to be treated as released from it in respect of the period stated. Accordingly, I find myself in disagreement, with all respect, with the county court judge, because it seems to me that the proper method of reading the two provisions together is to extract from them the result which I have indicated. It is not necessary to decide whether or not, if rent had been paid, it could have been recovered back. All that I need say with regard to that point is that, as at present advised, I see nothing which shocks me in the proposition that the rent could be recovered, nor do I see any insuperable difficulty in construing the section in a way which will produce that result. Expressing the matter in the language of the plain man, the legislature is saying to the tenant: "Notwithstanding the fact that you have bound yourself to pay rent in respect of a particular quarter, there shall be cut out from that quarter so much of the quarter as comprises the period when the premises were unfit, and your obligations shall be modified accordingly." Curious results would follow if that were not the true construction. Under a lease where the rent was payable quarterly in advance, the tenant would be excused from payment of his quarter's rent if his house was rendered unfit the day before quarter day, but would have to pay the whole of his quarter's rent if the bomb very inconveniently fell upon his house on the day following quarter day. The legislature is entitled to be capricious, of course, but nobody could deny that, if, in providing relief for tenants, it has produced that result, it would be highly capricious. I find some confirmation of the view which I have formed in the circumstance that in modification (*b*) the legislature, knowing quite well (as it must have known) that there are innumerable leases in this country under which rent is payable in advance, has chosen to use words of the widest import, which, read in their literal and ordinary sense, cannot be construed in such a way as to exclude rent payable in advance. The county court judge took that view of the *prima facie* meaning of the words, and I agree with him. I find it difficult to suppose that, if the legislature had meant to exclude the well-known and common case of rent payable in advance, it would have used language of this character, and would not have qualified it by saying in express terms that it was not to be read as applying to rent payable in advance. For those reasons, I must disagree with the conclusion of the county court judge, and, in my opinion, the appeal to that extent must be allowed.

MacKinnon, L.J.: I agree. I should not think it necessary to add anything if it were not for the fact that we are differing from the county court judge, who delivered an admirably clear and careful judgment. The question which was before him, and which is before us, arises on this obscure passage in the statute. I feel that the county court judge may well have been right, but, although I entertain that doubt, I am none the less constrained to express my difference from him. It is most unfortunate that nothing is said in sect. 11 as regards rent payable in advance—a provision which is very well known to be exceedingly common. Subsection (1) (*b*) says in clear terms:

> . . . no rent shall be payable by the tenant under the lease in respect of the period beginning with the date of the service of the notice of disclaimer and ending with the date on which the land is rendered fit.

When one has to apply a clear provision to the common case of rent paid or payable, in advance, so far as I can see there is only one possible method by which effect can be given to that subsection. That is to say, the landlord should be liable to repay that part of the rent paid in advance which is due in respect of the period specified. I think that it is possible to give effect to this part of the legislation only by treating that provision as necessarily implied in its terms. It follows that I agree with the result indicated by SIR WILFRID GREENE, M.R., and think that this appeal should be allowed.

GODDARD, L.J.: For myself, I feel that one is necessarily faced with the question whether or not, if this rent had been paid when it ought to have been paid, it could have been recovered back by the tenant. It would certainly be an odd situation if a tenant who failed to perform his obligation to pay his rent punctually could be in a better position than that of a tenant who had performed his obligation. For the reasons which have just been given by MACKINNON, L.J., I think that this rent would have been repayable if it had been paid on the due date, because, in my opinion, one must read the lease as though this provision were written in. That is to say, although the lease says that the rent shall be payable in advance, it is a proviso to the lease that, if the premises are rendered unfit by enemy action, no rent shall be payable during the period beginning with the date of the service of the notice of disclaimer and ending with the date on which the land has been rendered fit. I can see no way of making these two provisions work except by implying a term that the landlord shall repay the rent for that period. I think that one can fairly imply an indication of that sort in this case, bearing in mind the well-known judgment of LORD ESHER in *Hamlyn & Co.* v. *Wood & Co.* (1), in which he says, at p. 491:

> . . . the court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist.

I cannot see any way of giving effect to what I think must have been the intention of the legislature except by implying that, in such circumstances as would have arisen here had the rent been paid, the landlord should repay the rent for the period mentioned in the Act—that is to say, from the date of service of the notice of disclaimer to the time when the land is rendered fit.

There is only one other matter I should like to mention, speaking entirely for myself. I am expressing no opinion as to what the position would be where rent is payable in advance and a notice of disclaimer is served and accepted by the landlord but no counter-notice is served. That would involve a consideration of sect. 8 of the Act. So far as I understand our judgment, we are dealing only with a case where notice to avoid disclaimer has been served, and not with a case where a notice of disclaimer has been accepted by the landlord.

Appeal allowed with costs in both courts.

Solicitors: *Sydney Redfern & Co.* (for the appellants); *Ashurst, Morris, Crisp & Co.* (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

BOUDOU *v.* THORNTON SMITH.

[Court of Appeal (MacKinnon, Goddard and du Parcq., L.JJ.), **March 19, 1941.**]

Emergency Legislation—Landlord and tenant—War damage—Notice of disclaimer—" Unfit "—Landlord and Tenant (War Damage) Act, 1939 (*c.* 72), *ss.* 1, 4, 6, 11, 24.

Business premises let on lease were damaged by enemy action, and the lessee served a notice of disclaimer. The landlord applied under the Landlord and Tenant (War Damage) Act, 1939, s. 6 for a declaration that the notice was of no effect on the ground that the premises were not " unfit " within the meaning of the Act. The evidence of the landlord's surveyor was that the premises at the date of the notice were not fit for the carrying on of the tenant's business, but could be made so at small expense :—

Held : if the evidence is that premises are unfit for the purpose for which they are let, even though they can be rendered fit by the expenditure of a small sum on repairs, the tenant is entitled to serve a notice of disclaimer, because the Act places the liability to do those repairs, though small, on the landlord. If the landlord so desires, he can accept the disclaimer and then the lease is determined. On the other hand, the landlord can serve a notice to avoid disclaimer, but in that case he must do the repairs.

[**EDITORIAL NOTE.** The decision states in terms what has generally been accepted as the position under the Act. The liability to repair war damage is placed on the landlord in every case where the premises are found to be unfit. As pointed out by MacKinnon, L.J., there may be cases where the maxim *de minimis non curat lex* applies, because the damage and the cost of repair are so trifling, but such cases must be viewed as most exceptional. The tenant is under no obligation to repair war damage, and, if the landlord does not wish to or cannot effect the repairs, his proper course is to accept the disclaimer. If he does so, the lease is determined, and there is no further question as between the landlord and that tenant as to the liability for the repair of war damage. The landlord accepts the disclaimer by allowing the period of one month to elapse without serving a notice to avoid the disclaimer.

For the Landlord and Tenant (War Damage) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 982 *et seq.*]

APPEAL by the tenant from an order of His Honour JUDGE AUSTIN JONES sitting at the Westminster County Court, dated Jan. 8, 1941. The facts are fully set out in the judgment of GODDARD, L.J.

H. J. Astell Burt for the appellant.

W. E. P. Done for the respondent.

Astell Burt : Under the Landlord and Tenant (War Damage) Act, 1939, the tenant can serve a notice of disclaimer in respect of premises let at a rack rent if the premises are damaged by enemy action. If the landlord takes the view that the premises are fit within the meaning of the Act, he can commence proceedings for a declaration that the notice is of no effect. If, however, he takes the view that the premises have been rendered unfit, he can serve a notice to avoid disclaimer. The effect of that will be to make him liable to make good the damage. In the case of multiple leases, the county court judge may say that part of the premises are unfit, and that part of them are fit, and he can make what is really a new tenancy. Under sect. 6 of the Act, the burden of showing that the premises are not unfit rests upon the landlord. The question which arises in the present case is as to whether or not the premises were fit to be used on Oct. 20, 1940. The county court judge has misdirected himself as to the meaning of the word " unfit." Another point is as to whether or not the judge was right in refusing to entertain a point as to jurisdiction, on the ground that the point was not taken until the end of the trial. The lease was a multiple lease, and the proceedings ought to have been taken under sect. 15. In fact, they were taken under sect. 6. The question of fitness may vary according to whether or not the lease was a multiple lease. In the present case, the landlord should have served a notice to avoid disclaimer. That would have involved his being under an obligation to do the necessary repairs. It is a question of who is going to do the repairs which are necessary to make good the damage. The question of fitness is to be decided according to the user of the premises. It cannot be said that the premises comprised in the lease in the present case were fit for use as a snack bar or for the sale of motor accessories. Notice to avoid disclaimer must be served within a definite time. The court has power to extend the time, and I do not object to the time being extended. At the date of the notice of disclaimer, by reason of enemy action, the premises were in such a state that they were not fit for the purpose for which they were let.

Done : The Act does not say that the landlord shall elect between two alternative courses. The landlord can serve a notice to avoid disclaimer, in which case he assumes the liability imposed by sect. 11. There is nothing in the Act to suggest that that is the proper course for him to adopt. By sect. 6 the landlord is given an opportunity of obtaining the guidance of the court as to whether or not he will accept that liability. The Act enables the landlord to obtain the view of the court as to whether or not the disclaimer is based on good grounds.

That is indicated by sect. 6 (4). By that subsection, the Act deliberately contemplates that, the question having been settled, the landlord may then serve his counter-notice to avoid the disclaimer and to assume the liabilities which the tenant has invited him to assume.

GODDARD, L.J. [delivering the judgment of the court]: Upon an application by the landlord, upon whom a notice to disclaim a lease had been served by the tenant under the Landlord and Tenant (War Damage) Act, 1939, the county court judge decided that the notice was of no effect. The tenant appeals against that finding, and says that there was no evidence upon which the county court judge could find as he did.

It is to be observed, in the first place, that the Landlord and Tenant (War Damage) Act, 1939, s. 1, avoids any obligations to repair entered into by the landlord or the tenant where the necessity for repair arises from war damage. Then, under sect. 4 of the Act, it is provided that, where land comprised in a lease is unfit by reason of war damage, certain provisions shall have effect. One of these is that the tenant may serve a notice, referred to as a notice of disclaimer, stating that he elects to disclaim the lease. If he has elected to disclaim the lease, then sect. 6 (1) provides that, by his service of this notice, the landlord or any other person having an interest in, or derived out of, the term created by the lease to which the notice relates:

> . . . may, at any time within one month from the service of the notice, apply to the court to determine whether the notice is of no effect on the ground that the land comprised in the lease was not unfit by reason of war damage at the time when the notice was served.

Section 6 (4) provides as follows:

> If . . . the court determines that the land in question was unfit by reason of war damage at the time when the notice of disclaimer or notice to elect was served, the period allowed under this Act within which a notice to avoid disclaimer may be served by the landlord, or the notice to elect is to be complied with by the tenant, as the case may be, may be extended to such date as the court may fix.

Then in sect. 11 there are provisions under which the landlord can serve a notice to avoid disclaimer. The machinery provided by that section is this. When the notice of disclaimer has been served on him by the tenant, the landlord serves a counter-notice. Under that counter-notice, he can object to the disclaimer on the ground that he is willing to do the repairs, and, if he does serve a notice to avoid disclaimer, then he undertakes to put the premises into a fit condition, but, in the interval, no rent will be payable. I think that the only other section on this part of the judgment to which it is necessary to refer is sect. 24, the definition section. In that section, there is a definition of the word "unfit," and, for the purpose of this case, it is enough to say that "unfit" means:

> . . . unfit for the purpose for which those buildings or works were used or adapted for use immediately before the occurrence of the war damage in question, having regard to the class of tenant likely to occupy similar buildings or works which are not unfit for that purpose . . .

The property with which we are concerned is a property in Conduit

Street let for a term of over 27 years at a rent of £1,500 per annum. It is in fact divided into four shops, two of which are empty, while the other two have tenants. On the night of Sept. 24-25, a bomb fell in the neighbourhood of the premises, with the result that all the glass was blown out, ceilings were damaged in whole or in part, doors were blown in, panelling destroyed, door posts twisted, and so forth. The tenants of two of these shops which had been formed on the demised premises did some temporary repairs to enable them to carry on business. According to the evidence of the surveyor called by the landlord, at the date when the notice was served, the premises were in such a condition that business could not be carried on there unless some temporary repairs were carried out. It is needless to say that the surveyor called for the tenant was equally of that opinion, but he put the case a good deal higher than the surveyor called by the landlord. Therefore, the evidence before the county court judge was all one way. All the witnesses who were called agreed that the state of the premises was such that business could not be carried on there without at least some repairs being done. It may be that the repairs which were necessary to be done to enable business to be carried on were very small, or it may be that they turned out to be rather more expensive than was at first thought, but, however that may be, if premises are in such a condition that the purpose for which they were let—in this case, for shop premises—cannot be effectually carried on, it must follow that the premises are unfit. The Act does not say that, if they are unfit to a small degree, or if they can be put right and the obligation is on the tenant, the tenant shall not have the right to disclaim the lease. The scheme of the Act clearly is that, if the tenant serves a notice saying that the premises are unfit, and they are proved to be unfit, the landlord has the option of either accepting that notice, in which case the lease will come to an end, or serving his notice to avoid disclaimer, in which case he will have to do the repairs. In truth, the business side of this question is: " Who is liable to do the repairs necessary to make those premises fit for the purpose for which they were let ? " The answer is: " The landlord." The county court judge in his judgment said:

> I have considered the evidence and have had regard to the definition of the word " unfit " in sect. 24 of the Act, to the matters specifically referred to in that definition, and to all other circumstances, and I determine that the notice of disclaimer, dated Oct. 25, 1940, and served by the respondent on the applicant, is of no effect, on the ground that the land comprised in the lease was not unfit by reason of war damage at the time when the notice was served.

As I have pointed out, the evidence that it was unfit is all one way, and I think that the county court judge must really have meant by his judgment that he thought that such damage as there was could easily be put right, and that, therefore, the premises were not to be regarded as unfit—perhaps in his own mind giving to the word " unfit " the meaning of something in the nature of permanently unfit, or unfit to such an extent that the premises would require re-building. The Act says nothing about that at all. Here there is unanimity among the witnesses that business cannot be carried on upon the premises. It follows that the premises are unfit, although it may be that, by the expenditure of a comparatively small sum, they can be put right. Although it is not necessary to give a final decision upon the matter, I do not think that sect. 11 imposes on the landlord a higher obligation than to make the premises reasonably fit for the purpose of carrying on the business. If a plate glass window is blown out, then, if it is a class of premises for which a window is essential—as would be the case in most shops, at any rate—the plate glass window will have to be put back. It does not follow that every scar or every scratch which has been caused in the shop by reason of flying glass has to be repaired. The premises have to be placed in such a condition that business can reasonably be carried on there. I think that the county court judge must have overlooked the scheme of the Act in this respect. At any rate, reviewing the evidence as we have done, we think that it is impossible to support his conclusion that, on the evidence, he is entitled to find that the premises were not unfit. We think that we must find that the premises were unfit, and that would leave the landlord the opportunity, which has been given to him by the sections which I have read, of applying now to the court for leave to serve notice to avoid disclaimer if he so desires, in which case he will have to do such repairs as are necessary.

Counsel for the appellant took one other point, upon which it is necessary to say only a word, because he has not persisted in it. These premises were included in one demise. The tenant, having been granted the lease, proceeded to divide the premises into four shops, and counsel for the appellant contended that thereupon the lease became a multiple lease within the meaning of the Act, which defines that term as meaning a lease comprising buildings which are used, or adapted for use, as two or more separate tenements. He said that, in those circumstances, the procedure under sect. 6 was inapplicable, and that the whole of the proceedings were without jurisdiction, as the judge should have proceeded under sect. 15. That was an objection which was not taken until the county court judge was about to deliver his reserved judgment. The case had till then proceeded on the basis that the proceedings were properly instituted under sect. 6, and, according to the county court judge's note, counsel for the appellant, when addressing him at the hearing, had said that there was only one question—whether on Oct. 25, 1940, these premises were fit. It is not surprising that the county court judge refused to allow an entirely new point to be taken, and we think that he was right. It is impossible to say that he had no jurisdiction. If the parties chose to proceed upon the footing that this was one lease, they were at liberty to do so, and it is unnecessary for us to give a decision here upon the point —which was adumbrated in the argument—whether, whereas between the landlord and the tenant there is a demise of one building or piece of land, if the tenant chooses to turn that building, either by some permission given in the lease or because the landlord does not object, into two or more tenements or shops, that makes the lease a multiple lease. We need express no opinion upon that, because it is not necessary in this particular case. The result is that the appeal must be allowed with costs here and below.

MACKINNON, L.J.: I agree. During the course of the argument, I have had the very gravest doubts and difficulties as to the proper construction of various parts of this very obscure Landlord and Tenant (War Damage) Act, 1939. GODDARD, L.J., has resolved a good many of those difficulties, and I think that he is right as to the main structure of this Act. The county court judge appears to have held that this demised property was not unfit by reason of the fact that it could be made fit by the expenditure of a comparatively small amount of money upon repairs, as was shown by the fact that two of the subtenants had in fact done those repairs for themselves. There may well be a case where the amount of repairs necessary is so small that the maxim *de minimis non curat lex* applies, but, apart from such matters as that, I think that the view that they are not unfit because the tenant can repair them at a comparatively small expense runs counter to the express provision of sect. 1 of the Act that any obligation to repair under a lease in regard to war damage is rendered nugatory and of no effect. I cannot think that the county court judge was right in saying that these premises were fit—or, putting it the other way, were not unfit—because the tenant could do the repairs at a fairly moderate expense. The tenant is under no obligation to do such repairs, and I think that the machinery of the Act does not put that obligation directly upon the landlord, but indirectly puts it upon him if he is to reap thereby the benefit of being able to serve a counter-notice to negative the result of the tenant's notice of disclaimer.

There is only one other thing I want to say. I express no opinion whatever, but entirely reserve my opinion, on the question raised by counsel for the appellant as to whether, in the case of a single demise of large premises by what I may call a head landlord to a tenant and a sub-demise by that tenant of portions of those large premises to separate tenants, that renders the first tenancy a multiple lease within the meaning of sect. 15. I have very grave doubts as to whether it does, but I express no opinion upon it. I agree in the result proposed by GODDARD, L.J.

DU PARCQ, L.J.: I also agree. I should like to add that, for myself, I also express no opinion whatever, whether, in the circumstances of this case, the lease could be said to be a multiple lease within the definition in sect. 24 of the Act.

The only other thing I would like to add is this. I hope that it will be understood that there is nothing in the judgment of this court to suggest that, where, on the evidence, it is open to a county court judge to find that the premises are not unfit for use, a finding to that effect is at all likely to be disturbed by this court. Indeed, where there is no ground for saying that the county court judge has misdirected himself as to the law, and where there is evidence to support the finding, it would not be open to this court to disturb such finding. I am convinced, however, that in this case the county court judge did take the view that the premises could properly be said to be not unfit because, although they were not fit at the material date, it would be a very easy matter to make them fit. That will not do, in my opinion. In fact, I think that it is impossible to argue that that is sufficient ground for the decision, especially when one remembers that there is no obligation whatever on the tenant—or on anyone else, for that matter—apart from the provisions as to a notice of disclaimer, to do repairs where the damage is properly described as war damage. I agree that this appeal must be allowed.

Solicitors: *Forsyte, Kerman & Phillips* (for the appellant); *Harris, Chetham & Cohen* (for the respondent).

Appeal allowed with costs.

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

DAVIS *v.* CAMBRIAN WAGON WORKS, LTD.

[Court of Appeal (Scott, Clauson and Goddard, L.JJ.), **January 30, 31, 1941.**]

Workmen's Compensation—Redemption—Payment continued for 6 *months—Amount of payment varied within the* 6 *months—Whether redemption available—Workmen's Compensation Act,* 1925 (c. 84), *s.* 13.

The employers on Aug. 7, 1940, applied to redeem their liability to pay compensation to a workman. At that time the workman had been receiving compensation at the rate of £1 8*s*. 5*d*., per week for more than 6 months. On Sept. 10, 1940, the workman applied for the review of the amount of compensation by way of increase, and on Oct. 14, 1940, the employers submitted to an award in effect increasing the compensation to £1 10*s*. per week. The application to redeem came on for hearing on Oct. 25, 1940:—

Held: the Workmen's Compensation Act, 1925, s. 13, which provides that any weekly payment which has been continued for not less than 6 months may be redeemed, requires that the actual payment to be redeemed must have continued for 6 months. In this case the payment to be redeemed was a payment of £1 10*s*. per week and this had not continued for 6 months. The application to redeem was, therefore, refused.

[**EDITORIAL NOTE.** As will be seen from the judgments, this matter has been referred to on one or two occasions in the course of the judgments in previous cases, but the general view was that it was a matter which had not been definitely decided. It is now clearly settled that the actual payment to be redeemed must have continued for 6 months, and it is not sufficient that compensation shall have been paid for 6 months.

AS TO REDEMPTION OF WEEKLY PAYMENTS, see HALSBURY, Vol. 34, pp. 955-958, paras. 1307-1311; and FOR CASES, see DIGEST, Vol. 34, pp. 460-463, Nos. 3769-3798.]

Cases referred to:

(1) *Calico Printers' Assocn., Ltd.* v. *Higham*, [1912] 1 K.B. 93; 34 Digest 462, *3781*; 81 L.J.K.B. 232; 105 L.T. 734; 5 B.W.C.C. 97.

(2) *Clawley* v. *Carlton Main Colliery Co.*, [1918] A.C. 744; 34 Digest 461, *3775*; 87 L.J.K.B. 920; 119 L.T. 715; 11 B.W.C.C. 440; *revsg.*, [1917] 2 K.B. 691.

(3) *Curran (Edward) & Co.* v. *Kays*, [1928] 2 K.B. 469; Digest Supp.; 97 L.J.K.B. 806; 139 L.T. 294; 21 B.W.C.C. 203.

APPEAL from an award of His Honour JUDGE WETHERED sitting at the Bristol County Court, dated Nov. 1, 1940.

The facts, so far as they are material, were these. The workman had for more than 6 months been receiving compensation at the rate of £1 8*s*. 5*d*. per week. On Aug. 7, 1940, the employers applied to redeem that weekly payment. On Sept. 10, 1940, the workman applied for a review, claiming that the weekly amount should be increased to £1 10*s*., and that an additional 5*s*. per week should be paid under the provisions of the Workmen's Compensation (Supplementary Allowances) Act, 1940, s. 1 (*a*) as from Aug. 19, 1940, the date when that Act came into force. On Oct. 14, 1940, the employers submitted to an award for the increases as claimed. The application to redeem came on for hearing on Oct. 25, 1940, and the employers then sought to redeem the weekly payment of £1 10*s*., but not that of 5*s*. under the 1930 Act. The county court judge held that they were not entitled to redeem the weekly payment of £1 10*s*. without also redeeming that of 5*s*. In the Court of Appeal this point was not argued, the argument being restricted to whether the employers could redeem any weekly payment other than a weekly payment which had continued for 6 months at a constant amount.

Gilbert Paull, K.C., and *R. M. H. Everett* for the appellants.

F. A. Sellers, K.C., and *E. L. Benson* for the respondent.

SCOTT, L.J.: Counsel for the employers submitted that the expression "the liability therefor" in the Workmen's Compensation Act, 1925, s. 13, meant, not liability for the particular payment which had been "continued for not less than 6 months," but a liability in general to make compensation by way of a weekly payment under the Act, and, consequently, that he would be entitled to redeem as for a payment of 30*s*. per week, on the ground that such a payment came within the section. In my opinion, that contention is untenable. The primary object of the section is to enable a weekly payment of a known amount to be converted into a capital payment equal to three-quarters of the capital value of the weekly payment on a certain actuarial basis relating to interest tables. It is of the essence of the section that the weekly payments should be of a known amount. That is the effect of the section on its plain language.

However, the matter has really been concluded by the decision of the Court of Appeal in *Calico Printers' Assocn., Ltd.* v. *Higham* (1), in which Sir H. H. Cozens-Hardy, M.R., said, at p. 96:

> Compensation under the Act is payable where incapacity for work, whether total or partial, results from an injury. It is given in the form of a weekly payment lasting during the incapacity.

Then Sir H. H. Cozens-Hardy, M.R., referred to the statutory provisions relating to review, and dealt with the Workmen's Compensation Act, 1906, Sched. I, para. 17, which contained the provisions for redemption then in force. He continued as follows, at pp. 96, 97:

> Now, three points are clear: (*a*) The right to redeem is given to the employer only; there is no corresponding right given to the workman to claim a capital sum. (*b*) This right cannot be exercised hastily; the weekly payment must have been continued for at least 6 months. (*c*) A broad distinction is drawn between an incapacity to work which is "permanent" and one which is not "permanent." This distinction may sometimes be to the benefit of the workman and sometimes to his detriment. The arbitrator has, if the incapacity is "permanent," no discretion as to the amount. He cannot award less or more than 75 per cent of the actuarial value. If it is not "permanent" the arbitrator must fix the lump sum in his discretion, having regard to the evidence before him . . . He must start with the assumption that the existing weekly payment is proper; but he must go further, and ascertain as best he can whether that payment is likely to be proper during the rest of the man's life.

That was only for the purpose of ascertaining how far the payment was permanent, or, in other words, stabilised, so as to make conversion from weekly payment into capital payment a fair valuation.

The appeal must be dismissed with costs.

Clauson, L.J.: In this case, the parties concerned were minded to obtain a decision from the court as to whether or not an employer has the right to redeem what may be called the normal weekly payment without redeeming the supplementary allowance payable under the Act of 1940. The question could not be raised except by making an application to redeem, and, when the employers here did make that application, the point on which they desired a decision obviously could not arise unless they were in a position to redeem the normal weekly payment, apart from the supplementary weekly increase under the Act of 1940. Unfortunately, they seem to have chosen a case where it turned out that, as all were agreed, it was not just that the weekly payment of £1 8*s.* 5*d.* which had been made should continue, it being just that it should be increased to £1 10*s.* The parties concerned in the litigation decided that that was of no consequence, because the point which they wished to have decided concerned the redemption of the supplementary allowance. Therefore, they agreed to assume that the £1 10*s.* was the weekly allowance which ought to be redeemed, and they induced the county court judge to proceed on that footing. Ultimately, the county court judge dismissed the application, because he did not think that the employers' request to redeem the £1 10*s.* and leave the supplementary allowance unredeemed ought to be granted.

This court is now asked to deal with the case on the same footing, and to decide whether or not the county court judge's view on the redemption of supplementary allowances is right. Unless there was jurisdiction to redeem the normal payment of £1 10*s*., we cannot do that. If the £1 8*s*. 5*d*. had not been altered to £1 10*s*., no difficulty would have arisen. It is perfectly plain from the Act that an employer is not entitled to redeem a weekly payment unless it has been made for 6 months. I should have thought, myself, that, on the words of the section alone, that is the plain meaning. Even if I did not think so, however, it would be impossible to decide otherwise in this court, because in *Calico Printers' Assocn., Ltd.* v. *Higham* (1) both Sir H. H. Cozens-Hardy, M.R., and Fletcher Moulton, L.J., have stated in plain terms that it is essential that there should have been an actual payment for 6 months. We were referred to a *dictum* of Lord Finlay in *Clawley* v. *Carlton Main Colliery Co.* (2), which seems to take precisely the same view, and we were also referred to some observations of Sankey, L.J., in *Curran (Edward) & Co.* v. *Kays* (3), which, it was suggested, were consistent with a different view. As I read those observations, I do not think that Sankey, L.J., was intending to deal with this point at all, or that his view can be taken to be anything different from those expressed by Sir H. H. Cozens-Hardy, M.R., and Fletcher Moulton, L.J., in *Higham's* case (1) and by Lord Finlay in *Clawley's* case (2).

Lastly, it was suggested that Sir H. H. Cozens-Hardy, M.R., and Fletcher Moulton, L.J., were not prepared to express any opinion about a point which they did not think arose in the case before them, and that that was some indication that they differed from Lord Finlay, who, for the purposes of his *dictum*, had expressed an opinion. That seems to me to be quite wrong. However that may be, the decision of this court has been clear about it, and the county court judge should have refused to proceed with the case, because the employers cannot redeem the £1 10*s*., so that the question whether they can redeem the £1 10*s*. without redeeming the 5*s*. does not arise. The appeal must be dismissed with costs.

Goddard, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *James Turner & Son & Whitehouse*, agents for *Wansbroughs, Robinson, Tayler & Taylor*, Bristol (for the appellants); *Burn & Berridge*, agents for *James Wilson & Kinsey*, Wigan, (for the respondent).

[*Reported by* C. St.J. Nicholson, Esq., *Barrister-at-Law.*]

FIBROSA SOCIETE ANONYME *v.* FAIRBURN LAWSON COOMBE BARBOUR, LTD.

[King's Bench Division (Tucker, J.), **March 6, 7, 1941.**]

Contract—Frustration—Sale of goods—Delivery to named port—Named port becoming enemy-occupied territory—Trading with the Enemy Act, 1939 (*c.* 89), *s.* 1 (2) (*a*) (1).

Sale of Goods—c.i.f. contract—Delivery to named port—Right of vendor to insist on delivery at named port.

The defendants contracted in July, 1939, to deliver certain machinery to the plaintiffs, the delivery to be c.i.f. Gdynia. On Sept. 23, 1939, Gdynia was occupied by Germany and became enemy-occupied territory. The contract provided that if dispatch was hindered by any cause beyond the vendor's reasonable control including, *inter alia*, war, a reasonable extension of time should be granted. The defendants in Dec., 1939, repudiated the contract, although the plaintiffs had expressed their willingness to take delivery at Riga or Leeds :—

Held : (i) in the circumstances, the contract was frustrated by the fact that the place of delivery had become enemy-occupied territory.

(ii) the defendants had a right to insist on delivery at Gdynia, since that was not a term for the sole benefit of the plaintiffs and as such one which could be waived by them without the defendants' consent.

[**EDITORIAL NOTE.** The two points in this case are quite distinct. The first is purely a question of frustration and the chief point of interest in that aspect of the case is that the parties seem to have attempted to provide in their contract for the events which actually happened. The second point is purely a point arising on a contract for the sale of goods. It is contended that a term regulating delivery is one that can be waived as wholly for the benefit of one party, but this is held not to be so.

As to Place of Delivery, see HALSBURY, Hailsham Edn., Vol. 39, pp. 214, 215, para. 286 ; and for Cases, see DIGEST, Vol. 39, pp. 546-548, Nos. 1562-1571.]

Cases referred to :

(1) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119 ; 12 Digest 399, *3233* ; 87 L.J.K.B. 370 ; 117 L.T. 766.

(2) *Ertel Bieber & Co.* v. *Rio Tinto Co.*, *Dynamit Act.* v. *Rio Tinto Co.*, *Vereinigte Koenigs & Laurahuette Act.* v. *Rio Tinto Co.*, [1918] A.C. 260 ; 12 Digest 395, *3211* ; 87 L.J.K.B. 531 ; 118 L.T. 181.

(3) *Maine Spinning Co.* v. *Sutcliffe & Co.* (1917), 34 T.L.R. 154 ; 39 Digest 546, *1562* ; 87 L.J.K.B. 382 ; 118 L.T. 351.

(4) *Wackerbarth* v. *Masson* (1812), 3 Camp. 270 ; 39 Digest 555, *1631*.

(5) *Chandler* v. *Webster*, [1904] 1 K.B. 493 ; 12 Digest 407, *3282* ; 73 L.J K.B. 401 ; 90 L.T. 217.

Action for damages for breach of contract. The facts are fully set out in the judgment.

Sebag Shaw for the plaintiffs.

G. O. Slade for the defendants.

Tucker, J. : This is an action brought by the plaintiffs, a company incorporated under the laws of Poland, against the defendants, a company carrying on business at Leeds. The claim is brought in respect of a contract in writing dated July 12, 1939, and by it the plaintiff company claims the usual forms of relief, in the alternative, in respect of the defendants' alleged failure to perform that contract—namely, the return of £1,000 paid by the plaintiffs to the defendants for a consideration which they allege has wholly failed ; damages, or, alternatively, specific performance; and, under the head of further or other relief, their counsel asks for a declaration. Counsel for the plaintiffs admits that, if he can get back his £1,000, and if I think that the proper remedy is damages, then the damages which he claims in addition to the £1,000 would be only nominal damages.

The material facts necessary for the purpose of enabling me to decide the principal issue of the case have been admitted or agreed, and they are these. The contract was made between the plaintiffs and the defendants. At one time, there was an issue as to whether the plaintiffs were entitled to sue under this contract, but it is now agreed that the parties to the contract are the plaintiffs and the defendants. The contract was for the delivery by the defendants to the plaintiff company of certain hackling machines, which are set out in the order dated July 12, 1939, which, it is agreed, contains the terms of the contract. The price was the sum of £4,800, and the contract provided that the goods were to be packed and delivered c.i.f. Gdynia, which is a port in Poland, and that delivery was to be within three or four months of settlement of the final details. It is also agreed that, under the contract, delivery should be made in or about Oct., 1939. That means that by that time the final details referred to in the contract had been settled. It is agreed also that on and from Sept. 23, 1939, Gdynia has been in enemy territory within the meaning of the Trading with the Enemy Act, 1939. It is admitted that, under the contract, £1,000 has been paid by the plaintiffs to the defendants, and no more. It is also admitted that it was at all times the intention of the plaintiffs to erect the machinery in question at Wilno, and that Wilno is, and has at all material times been, situated in neutral territory. The contract stipulated that the defendants should provide the services of a *monteur* to superintend the erection of the machinery. There is nothing in the contract as to the place of erection, and, under the contract, it may be that the plaintiffs could have selected various places for the erection of the machinery. The admission is, not that Wilno was the contractual place of erection, but that it was the place at which, in fact, at all material times the plaintiffs intended to erect this machinery. There is one further matter to which I should refer, and that is that the defendants have, in fact, repudiated this contract. The letter relied upon is dated Dec. 15, 1939. It is also agreed that, before the repudiation by the defendants, the plaintiffs were willing to take delivery of these goods either at Riga or at Leeds, in England, instead of insisting upon delivery c.i.f. Gdynia, which was the place of delivery under the contract.

The point taken for the defendants is that this contract has been frustrated, to use the word which is applied to cases of this kind. Before considering that point, I should refer to one, at any rate, of the conditions of sale which formed part of the contract between the parties. Condition 7 provides as follows:

> . . . should the despatch be hindered or delayed by your instructions or lack of instructions, or by any cause whatsoever beyond our reasonable control, including strikes, lockouts, war, fire, accidents, defective material, or approval of drawings, a reasonable extension of time shall be granted.

This contract having been made, war broke out between Poland and Germany on Sept. 1, 1939, and on Sept. 3, 1939, war broke out between Great Britain and Germany. Therefore, the position was that the plaintiff company in Poland and the defendant company in England found their countries at war with a common enemy—namely, Germany. On Sept. 5, 1939, the Trading with the Enemy Act, 1939, was passed. As I have already said, on Sept. 23, 1939, Gdynia was occupied by the enemy, and has remained enemy-occupied territory ever since. The Trading with the Enemy Act, 1939, s. 1 (2), provides as follows:

> For the purposes of this Act a person shall be deemed to have traded with the enemy (*a*) if he has had any commercial, financial or other intercourse or dealings with, or for the benefit of, an enemy, and, in particular, but without prejudice to the generality of the foregoing provision, if he has (*i*) supplied any goods to or for the benefit of an enemy, or obtained any goods from an enemy, or traded in, or carried, any goods consigned to or from an enemy or destined for or coming from enemy territory . . .

"Enemy territory" is defined by sect. 15 as follows:

> . . . any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at war . .

It is said by counsel for the defendants that this contract became frustrated, in the first instance, merely by the occurrence of the outbreak of war. Whether or not he is right about that, he says that, at any rate, the joint effect of the passing of the Trading with the Enemy Act, 1939, and the occupation of Gdynia by the enemy was the frustration of this contract. Counsel for the plaintiffs says that that is not so, that this is a case where the parties have, by the contract, provided for the precise events which have happened, and that, by the contract, they have expressly provided that, in the case of war, the contract shall be suspended for a reasonable time. Having regard to the fact that this is a contract made between the subjects of friendly and allied countries, I do not think that the mere outbreak of war between Great Britain and Germany had the effect of frustrating this particular contract. If it is necessary to decide this question at present, I think that, until Gdynia became occupied by the enemy, condition 7 would have applied, and that the contract, or the performance of the contract, would have been suspended for a reasonable time. In my view, however, that is not essential for the decision of this case, because I have come to the conclusion that, from the moment when Gdynia was occupied by the enemy, the contract became frustrated by reason of the provision in the Trading with the Enemy Act, 1939, to which I have referred. I think that any attempt to carry out this contract would involve a breach of that Act, and the defendants would have been trading in, or carrying, goods destined for enemy territory if they had performed their obligation under the contract. That, of course, is not conclusive, because I think that counsel for the plaintiffs agrees that the mere delivery of the goods in Gdynia would have been a breach of that clause. He says, however, that, even if that is so, it does not follow that the contract has been frustrated, and that, as long as the defendants do not actually deliver in Gdynia, the contract still continues, although it is in a state of suspension.

I think that this case is governed by *Metropolitan Water Board* v. *Dick Kerr & Co.* (1), because it is a case where, as I have already said, the parties are subjects of friendly and allied countries. It is not a case where one of the parties is the subject of a country at war with this country—namely, Germany. *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1), was the case of a contract between two parties in this country, and what was relied upon there as bringing about frustration was the giving of a notice by the Ministry of Munitions, in the exercise of statutory powers and regulations, requiring the work on the contract to cease. It is to be observed that in that case LORD FINLAY, L.C., said, at p. 126:

> It was not disputed, as I understand the argument for the appellants, that in the case of a commercial contract, as for the sale of goods or agency, such a prohibition would have brought it to an end. It was sought to distinguish the present case on the ground that the contract was for the construction of works of a permanent character, which would last for a very long time, and that a delay, even of years, might be disregarded.

Then he pointed out why he did not agree with that contention.

In *Ertel Bieber & Co.* v. *Rio Tinto Co.* (2), it is to be observed that LORD DUNEDIN dealt with the position which would occur if a contract of the kind with which he was dealing was held to be suspended for the duration of the war. He said, at p. 275:

> Let me now apply this rule to cl. 15 on the hypothesis that it does suspend delivery during the war. But for it the contract would immediately end, by it the contract is kept alive, and that not for the purpose of making good rights already accrued, but for the purpose of securing rights in the future by the maintenance of the commercial relation in the present. It hampers the trade of the British subject, and through him the resources of the kingdom. For he cannot, in view of the certainly impending liability to deliver (for the war cannot last for ever), have a free hand as he otherwise would. He must either keep a certain large stock undisposed of, and thus unavailable for the needs of the kingdom, or, if he sells the whole of the present stock, he cannot sell forward, as he would be able to do if he had not the large demand under the contract impending. It increases the resources of the enemy, for if the enemy knows that he is contractually sure of getting the supply as soon as war is over, that not only allows him to denude himself of present stocks, but it represents a present value which may be realised by means of assignation to neutral countries.

I think that this commercial contract was clearly frustrated directly Gydnia came into enemy occupation, and that it was not merely suspended under the provisions of condition 7. However, counsel for the plaintiffs puts forward a further argument to resist the consequences of frustration. He says that the insertion of c.i.f. Gdynia as the place of delivery was a provision for the benefit of his clients, which they were entitled to waive;

that, without any repudiation, they did waive that requirement, and so informed the defendants; that they were willing to take delivery either at Riga or at Leeds; and that, if they were entitled to do that and hold the defendants in other respects to the contract, then no question of the infringement of the Trading with the Enemy Act, 1939, arises at all. The answer of counsel for the defendant to that argument is that the insertion of the place of delivery in the contract is not solely for the benefit of the purchaser so that he can waive it if he thinks fit, but is a term of the contract upon which the vendor is entitled to insist if he so desires, and he relies upon *Maine Spinning Co.* v. *Sutcliffe & Co.* (3), a decision of Bailhache, J. The headnote of that case is as follows:

> In January, 1915, the defendants, an English company, sold to the plaintiffs, an American company, a quantity of woollen tops. The contract contained the following clauses: "This order is taken subject to the embargo being removed, and your affidavits being accepted" and "Delivery Liverpool, England." In the communications leading up to the contract the expression "f.o.b. Liverpool" had been used. There was at the time of the contract an embargo against the export of wool from the United Kingdom except under licence, and the course of business was for the defendants to obtain such licence, though they were under no obligation to do so The defendants, having failed to obtain the necessary licence, did not deliver a portion of the stipulated quantity, and the plaintiffs brought an action against them for damages and contended that they had an option to require delivery in England in lieu of shipment.
>
> Held: that in the circumstances "delivery Liverpool" meant "delivery f.o.b. Liverpool," and the buyers were not entitled to claim delivery at Liverpool without the goods having been put on board ship, and therefore the action failed.

In the course of his judgment, Bailhache, J., is reported to have said, at p. 155:

> Mr. Schwabe then said that it was open to the buyers to waive one of the terms of the contract, and to claim delivery of the goods at Liverpool without their having been put on board ship. That, however, was a mistaken view of the law. If a term of the contract was entirely for the benefit of one party to the contract it was open to that party to waive the benefit of such condition. But a term in a contract as to the mode of delivery was not inserted wholly for the benefit of one party to the contract, and it could not be waived by one party to the contract without the consent of the other party.

Then he referred to *Wackerbarth* v. *Masson* (4), a decision of Lord Ellenborough in 1812. The headnote to that case reads as follows:

> Where in a contract for the sale of sugar, there is the following term: "Free on board a foreign ship," the seller is not bound to deliver it into the hands of the purchaser, or to transfer it into his name in the books of the warehouse where it lies, but only to put it on board a foreign ship, which it is the duty of the purchaser to name.

In his judgment, Lord Ellenborough said, at p. 271:

> The delivery for which the plaintiff undertook was—on board a ship to be named by the defendant. He was always ready to deliver the sugars in this manner and he offered to do so. But the defendant requires a *tertium quid.* Instead of naming a ship, he demanded to have the sugars weighed off and delivered into his own hands, or transferred to his own name in the warehouse-keeper's books. The seller might have been exposed to some risk, or might have lost some advantage by agreeing to this, and he had a right to refuse, as it was not the mode of delivery for which he had stipulated. The defendant is therefore liable for a breach of the contract in afterwards refusing to accept and pay for the goods.

If that is the position with regard to a f.o.b. contract, I think that the same certainly must be the position with regard to a c.i.f. contract.

Counsel for the plaintiffs seeks to distinguish this case by saying that this is in fact a c.i.f. contract and not a f.o.b. contract, and he furthermore invites me not to follow *Wackerbarth* v. *Masson* (4) and *Maine Spinning Co.* v. *Sutcliffe & Co.* (3). I hope that I am not lacking in my share of judicial courage, but I confess that, when I am invited not to follow a decision of LORD ELLENBOROUGH in 1812, and furthermore a decision on a matter of this kind by BAILHACHE, J., my courage fails me, and I do follow and accept their decisions. As I say, if that is the law in regard to a f.o.b. contract, it certainly must be the law in regard to a c.i.f. contract.

There is another matter with which I have to deal, and which was raised in the final argument of counsel for the plaintiffs. He said that, looking at the correspondence, I ought to come to the conclusion that the property in some of these goods—namely, two of the machines—had in fact passed, and that, therefore, the plaintiffs were entitled to an order for the delivery of those machines. In regard to that, I can find nothing in this c.i.f. contract, and nothing has happened which I can find on the correspondence, or from any admissions which have been made, showing that the property in any of these goods has passed to the plaintiffs. Nor can I find in the statement of claim any claim framed on that basis. Therefore, I cannot accept that argument.

With regard to the £1,000 which has already been paid, counsel for the plaintiffs seeks a return of that, and agrees that, if the contract has been frustrated, he cannot get it back so long as *Chandler* v. *Webster* (5) remains the law of England, but he formally takes the point before me in order to preserve his position before a higher tribunal. I merely mention the point, therefore, and say that *Chandler* v. *Webster* (5) is, of course, binding upon me, and, under the law there laid down, this contract having been frustrated, as I find, it is impossible for the plaintiffs to recover the £1,000 paid under the contract before the frustration took place. The result is that there must be judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitors: *A. Kramer & Co.* (for the plaintiffs); *Maxwell, Batley & Co.*, agents for *Simpson, Curtis & Burrill*, Leeds (for the defendants).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

BRUETON *v.* WOODWARD.

[King's Bench Division (Singleton, J.), **February 24, 1941.**]

Limitation of actions—Action on a statute—Action based on Gaming Act, 1835, *s.* 2—*Action on specialty—Limitation Act,* 1939 (*c.* 21) *s.* 2 (3).

By two cheques dated June 19, 1922 and June 24, 1922, the plaintiff A
paid the defendant the sum of £239 10*s.* in respect of gaming debts. Relying upon the Gaming Act, 1835, s. 2, he claimed in this action, commenced on Aug. 10, 1940, to recover back the sums so paid. The defendant pleaded that the recovery of the sums so paid was barred by the Limitation Act, 1939 :—

Held : the action was one brought on a statute, and not one on a cause B
of action given by a statute. Since the action was commenced after the coming into operation of the Limitation Act, 1939, on July 1, 1940, the period of limitation was that prescribed by that Act. The period of limitation was 12 years, the action being one on a specialty and within sect. 2 (3) of the 1939 Act.

C

[**EDITORIAL NOTE.** The action in this case is of a type that was only too common some years ago, but the real issue on this hearing was the application of the Limitation Act, 1939. The judgment sets out very clearly what actions would be governed by the previous Acts, but as the writ in these cases must have been issued by July 1, 1940, it is only in exceptional cases that that position will now arise. Where the action is commenced after July 1, 1940, the appropriate period of limitation will be that provided by the 1939 Act. D
Quite part from that, there is the further point whether this action was one brought on a statute or one brought on a cause of action given by a statute. It is decided that, since the right to sue is created by the Act of 1835, the action is one on a statute. Before July 1, 1940, the period of limitation in such a case would have been 20 years under the Civil Procedure Act, 1833, s. 3, but it is now 12 years under sect. 2 (3) of the 1939 Act.

E

As to Actions on a Statute, see HALSBURY, Hailsham Edn., Vol. 20, pp. 647, 648, para. 824 ; and for Cases, see DIGEST, Vol. 32, pp. 394, 395, Nos. 753, 754.]

Cases referred to :

(1) *Brookes* v. *Brown* (1922), 39 T.L.R. 3 ; 25 Digest 419, *225.*

(2) *Beadling* v. *Goll* (1922), 39 T.L.R. 128 ; 25 Digest 419, *227.* F

(3) *Bowling* v. *Camp* (1922), 128 L.T. 342 ; 25 Digest 419, *226.*

(4) *Henshall* v. *Porter*, [1923] 2 K.B. 193 ; 25 Digest 419, *229* ; 92 L.J.K.B. 866 ; 129 L.T. 443.

(5) *Shepherd* v. *Hills* (1855), 11 Exch. 55 ; 32 Digest 395, *755* ; 25 L.J.Ex. 6 ; 4 L.T. 742.

(6) *Gutsell* v. *Reeve*, [1936] 1 K.B. 272 ; Digest Supp. ; 105 L.J.K.B. 213 ; 154 L.T. 1. G

Action to recover back the sum of £239 10*s.*, the amount of two cheques paid by the plaintiff to the defendant in respect of gaming debts. The payments were made in 1922. This action was commenced on Aug. 10, 1940. The only other material date was July 1, 1940, when the Limitation Act, 1939, came into operation. H
The defence was that the action was barred by lapse of time and that the 1939 Act applied to this case.

H. H. Hanworth for the plaintiff.
C. L. Henderson for the defendant.

Singleton, J.: The plaintiff in this case is a bookmaker. He claims against the defendant the sum of £239 10*s.*, being the amount recoverable from the defendant under certain provisions of the Gaming Act, 1835, in connection with certain bets on horse racing. It is admitted that the cheques here sued on were given in respect of betting or racing losses, but the defendant pleaded that they were barred by the Limitation Act, 1939.

Some years ago, a great number of actions were brought under the Gaming Act, 1835, s. 2, in respect of cheques which had been paid upon gaming or betting losses, and often it was thought that the Act of Parliament rarely resulted in justice in all the circumstances. Consequently, the legislation was amended, and the Gaming Act of 1922 was passed. That Act repeals the Gaming Act, 1835, s. 2, which provided as follows:

> And be it further enacted that in case any person shall, after the passing of this Act, make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited Acts . . . or by any one or more of such Acts declared to be void, and such person shall actually pay to the indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last person to the person who shall so have paid the money, and shall accordingly be recoverable by action at law in any of His Majesty's Courts of Record.

Upon that, as I have said, proceedings were taken from time to time, and in 1922 the Gaming Act, 1922, was enacted, which in sect. 1, provided as follows:

> Section 2 of the Gaming Act, 1835 . . . is hereby repealed. No trustee, executor, or other person acting in a representative or fiduciary capacity shall be under any obligation to make or enforce any claim under the said section in respect of any transaction completed before the passing of this Act, or be liable for any breach of duty by reason of any failure to do so. No action for the recovery of money under the said section shall be entertained in any court.

The meaning of the last sentence—namely, "No action for the recovery of money under the said section shall be entertained in any court"—was obscure, and litigation was commenced to determine whether the rights of the parties were completely taken away if the right of action under the earlier Act had accrued before the passing of the 1922 Act. Different decisions were given and these were considered, in particular by McCardie, J., before whom a number of the cases came. The first of these decisions was *Brookes* v. *Brown* (1), decided by Acton, J., apparently after consultation with Greer, J., who gave a decision in *Beadling* v. *Goll* (2). The cases which came before McCardie, J., were *Bowling* v. *Camp* (3) and *Henshall* v. *Porter* (4). The last of those cases was the only one which dealt with the position which arises in this case, where the right of action, if any, accrued before the passing of the 1922 Act, but where proceedings were not brought until after that Act came into force. McCardie, J., decided that in such a case the right of action given by the 1835 Act was not destroyed.

It is well to notice that in *Beadling* v. *Coll* (2), in the Court of Appeal, BANKES and WARRINGTON, L.JJ., appear to have dealt with the matter generally, but the judgment of SCRUTTON, L.J., is thus reported at p. 129 :

> . . . it was a pity that Parliament and those who advised Parliament did not see that the matter was made clear. To his knowledge a question was put down to be asked of the Law Officers as to the effect of the Act, but the question was not allowed to be put. It was a great pity that legislation was carried on in this way on a point which any lawyer must have foreseen would arise and on which the wording of the Act was left in deliberate obscurity. It might have been a question of tactics whether the Act could be passed. All that he decided on the present occasion was that the Act was not retrospective in regard to actions commenced before the passing of the Act and in which judgment had not been given when the Act came into force.

He deliberately left open the question as to whether the right of action survived if the action was commenced after the Act had come into force. In *Henshall* v. *Porter* (4), MCCARDIE, J., dealt with that matter, and I am bound by his decision that the right of action survives notwithstanding the terms of the Gaming Act, 1922. But for that decision, I confess, in view of the words "No action for the recovery of money under the said section shall be entertained in any court," I should have felt very grave doubt on the matter, though I appreciate that MCCARDIE, J., in the decision given by him went into the matter very fully, and considered all the law on it, and particularly the various points arising under the Interpretation Act, 1889, s. 38. I say no more, but I assume, for the purpose of this action, that the right of action survives, and is not abrogated by the Gaming Act, 1922. At the time when that Act came into force, this cause of action already existed, the cheques having been paid on June 19, 1922, and June 24, 1922. On those grounds, counsel for the plaintiff asks me to give judgment in his favour.

Although I think that counsel for the defendant would desire to keep open the question as to whether or not the Gaming Act, 1922, took away the right of the plaintiff, he did not argue it before me, but he submitted that the alleged debt, if any, was barred by the Limitation Act, 1939, and it is upon that ground that he asks me to deal with the case. I have heard counsel for the plaintiff in reply upon that. The Limitation Act, 1939, is entitled :

> An Act to consolidate with amendments certain enactments relating to the limitation of actions and arbitrations.

It does alter the law in regard to certain matters, and in particular I notice that sect. 21 provides a limitation of 12 months in respect of actions against public authorities, whereas formerly under the Public Authorities Protection Act, 1893, it was six months. Over and above that, however, in sect. 2 of the Act there is a general provision for limitation of contract, tort and certain other actions. Sect. 2 (1) provides as follows :

> The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say : (*a*) actions founded on simple contract or on tort ; (*b*) actions to enforce a recognisance ; (*c*) actions to enforce an award, where the submission is not by an instrument under seal ; (*d*) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

Thus there is now a period of six years during which actions can be brought to recover any sum recoverable by virtue of any enactment. The submission of counsel for the defendant was that that applies to this case, and the amount which the plaintiff claims may be described as A a sum recoverable by virtue of any enactment—that is, by the Act of 1835. Alternatively, he says that, if that does not apply, one must look at the Limitation Act, 1939, s. 2 (3), which provides as follows:

> An action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued . . .

B Counsel for the plaintiff submitted that this Act did not apply at all, that this action was an action brought on a statute, and that, by virtue of the decision in *Shepherd* v. *Hills* (5), it was clear that, the action being brought on a statute, the period of limitation under the Civil Procedure Act, 1833, was 20 years.

C Counsel for the defendant submitted that this was not an action brought on a statute, and he drew my attention to a decision of the Court of Appeal in *Gutsell* v. *Reeve* (6), and in particular to the judgments of LORD WRIGHT, M.R., and ROMER, L.J., and directed my attention to the commencement of the judgment of ROMER, L.J., where he said, at D p. 288:

> The question which arises upon this appeal may be stated in this way: Is the plaintiff bringing an action on the statute of 1924, or is he merely suing in respect of a cause of action given to him by that statute?

He drew attention, as LORD WRIGHT, M.R., had already done, to the distinction between bringing an action on a statute and merely suing in E respect of a cause of action given by a statute. Counsel for the defendant submitted that, under the Gaming Act, 1835, s. 2, this was a debt, and at most a debt, owed by the defendant to the plaintiff, and, in the words of the statute:

> . . . shall be deemed and taken to be a debt due and owing . . . to the person who F shall so have paid the money, and shall accordingly be recoverable by action at law in any of His Majesty's Courts of Record.

Counsel for the defendant submitted that the plaintiff was suing not on the statute, but merely in respect of something which was due to him and made due by the statute.

G I do not think, myself, that the decision of the Court of Appeal in *Gutsell* v. *Reeve* (6) really helps us in this case. Each case, of course, must depend upon its own facts and upon the statute which creates the right. I take the view, as far as I have been able to consider it, that the plaintiff is bringing an action on the Gaming Act, 1835. His writ is so H framed. It is true that that does not determine the matter at all, but the right to sue—and, indeed, everything connected with the right—is created by sect. 2 of the Act of 1835, and he is properly described as suing under, and by virtue of, the provisions of that Act. That being so, the debt is a statutory debt, and, if the law was as it was prior to the 1939 Act, I take it that the contention of counsel for the plaintiff that there was a time limit of 20 years in which he could bring the action would be right.

However, the law was changed. In 1939, it was thought that it was quite time that the law was made clearer with regard to the limitation period. I have already referred to sect. 2 of the 1939 Act. Sect. 2 (3) provides as follows:

> An action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued . . .

In my view, that provision applies to this action. This is an action upon a specialty and the period of limitation is 12 years since the Act of 1939 came into force.

It is not necessary to look at the section under which counsel for the defendant contended that there was a six-years' limitation. The parties agree that, if the Act of 1939 applies, in any event the plaintiff's claim is barred by the lapse of time. The Limitation Act, 1939, received royal assent on May 25, 1939, and by sect. 34 (2) it is provided that the Act shall come into operation on July 1, 1940. Counsel for the plaintiff argued that the Act did not apply at all to a case of this kind, because otherwise, he said, just as was settled by McCardie, J., in dealing with the provisions of the other Act, one would be taking people's rights away and Parliament did not make it clear that that was intended. I do not think that one would be taking away the rights of anyone by doing that which it appears to me this Act did. There had been differences of opinion as to what the precise period of limitation was in certain cases. It was sought to make them clear, and a time limit or a period was given, within which anyone who had a right could take steps to protect that right by issuing a writ, so that time would not run against him. In other words, the royal assent to the Act having been given on May 25, 1939, it was provided that the Act should not come into operation until July 1, 1940, some 13 or 14 months later, and during that period anyone whose period of limitation might otherwise be cut down had time in which to avoid that result. Consequently, no existing right was interfered with at all, if the party who had that right did that which he could do prior to the Act coming into force, namely, commence the action, because it is provided by sect. 33 (*b*) as follows:

> Nothing in this Act shall . . . (*b*) affect any action or arbitration commenced before the commencement of this Act . . .

Therefore, as from July 1, 1940, the Limitation Act, 1939, applies, but no one's rights are taken away. If anyone had a right of action in respect of which he might have had a longer period before it was limited, he could protect himself by commencing that action before July 1, 1940. He was not deprived of it at all.

The plaintiff commenced his action on Aug. 10, 1940, and I think that one has to look at sect. 2 (3), which provides as follows:

> An action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued . . .

The cause of action in this case, according to the plaintiff, accrued in June, 1922, and, if that is when the cause of action accrued, it being, as

I hold, upon a specialty, the action cannot be brought after June 24, 1934, unless the plaintiff has protected himself by commencing his action before the Limitation Act, 1939, came into force. He did not do so. Therefore, I think that the action is ill-founded. I cannot help feeling satisfied that that result does arise, because, if ever there was an action in which one would think there ought to be some period of limitation, it is in circumstances of this kind, where cheques have been paid for betting losses or winnings in 1922, and then more than 18 years later the plaintiff brings an action to recover back his money.

Judgment for the defendant with costs.

Solicitors: *Leslie Marrison* (for the plaintiff); *W. H. Bellamy*, agent for *Thomas Coates & Ensor*, Birmingham (for the defendant).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

MASON *v* WARLOW.

[COURT OF APPEAL (MacKinnon, Goddard and du Parcq, L.JJ.), **March 19, 1941.**]

Limitation of Actions—Tenancy at will or from year to year—Agreement to let cottage and shed—Tenant quitting cottage but retaining possession of shed—No rent paid for 17 *years—Landlord's right to recover possession of shed barred—Limitation Act*, 1939 (c. 21), *ss.* 4(3), 9(2).

The appellant was the successor in title of J.M., who let to the respondent a cottage and shed at a rent of 6*s.* per week by an agreement in writing dated Mar. 30, 1921. It was a term of the agreement that the tenancy could be determined by either party on 4 weeks' notice being given in writing. The respondent gave up the possession of the cottage in 1923, but was allowed to remain in possession of the shed, and he had remained in possession of it from that time without paying any rent. On Oct. 1, 1940, the appellant gave the respondent notice to quit the shed, the notice purporting to be under the terms of the agreement of Mar. 30, 1921. Subsequently the appellant commenced proceedings in the county court to recover possession. The respondent relied upon the Limitation Act, 1939:—

HELD: the respondent had not retained possession of the shed under the agreement in writing of 1921. His tenancy of the shed from 1923 was either a tenancy at will or from year to year, and, under the Limitation Act, 1939, s. 9 (2), the landlord's right to recover possession would be barred at the expiration of 12 years from 1924, that is, in 1936. The appellant's claim was, therefore, barred.

[**EDITORIAL NOTE.** The effect of the Limitation Act, 1939, is the same as that of the old law in the case of a tenancy at will or a tenancy from year to year not under a written agreement. The point in this case is what was the effect in law of the events in 1923, when the tenant retained possession of the shed without the terms of his continued occupation being specified. The Court of Appeal has held that he must either have become a tenant at will or a tenant from year to year and, in either case, the claim for possession by the landlord was barred by lapse of time.

As to Tenancies at Will and from Year to Year, see HALSBURY, Hailsham Edn., Vol. 20, pp. 702-708, paras. 925-934 ; and for Cases, see DIGEST, Vol. 32, pp. 451-454, Nos. 1183-1205.]

Cases referred to :

(1) *Smith* v. *Baker & Sons,* [1891] A.C. 325; 13 Digest 527, *789 ;* 60 L.J.Q.B. 683 ; 65 L.T. 467.

(2) *Doe d. Davy* v. *Oxenham* (1840), 7 M. & W. 131 ; 32 Digest 447, *1157 ;* 10 L.J.Ex. 6.

Appeal by the plaintiff from an order of His Honour Judge Samuel sitting at the Builth County Court, dated Jan. 9, 1941. The appellant claimed possession of a shed which was in the possession of the respondent and which had originally been let to him together with a cottage by the appellant's predecessor in title under an agreement dated Mar. 30, 1921. Possession of the cottage was given up by the respondent in 1923, but he had continued in possession of the shed ever since, and had paid no rent in respect of it. The county court judge held that the landlord's claim was barred under the Limitation Act, 1939. There was also a counterclaim by the respondent for damages, on the ground that the appellant had entered into the shed on two occasions and put the respondent's goods and chattels into the road. On the counterclaim, the county court judge awarded the respondent the sum of £20.

R. Gwyn Rees for the appellant.

C. E. Shebbeare for the respondent.

Gwyn Rees : Where there is a written tenancy agreement, time does not begin to run against the landlord until the tenancy is determined. The period does not commence to run until the tenancy has been determined, no matter for how long rent has not been paid. No right of action accrues until notice to quit is given. [Counsel referred to *Doe d. Davy* v. *Oxenham* (2).]

Counsel for the respondent was not called upon.

MacKinnon, L.J. : This may well be considered a hard case by many people, because it is a case in which, by the operation of law, the property of one person has been transferred, without any payment to him, to another. The other aspect of this case which one has to bear in mind is that it is an appeal from a county court. In regard to an appeal from a county court, as long ago as 1891, Lord Halsbury said, in *Smith* v. *Baker & Sons* (1), at p. 333 :

> This was an action originally tried in the county court, and it is very important to bear in mind that only a limited appeal is allowed by law in actions so tried. There is no power to review the decision of fact arrived at in the county court by any other tribunal than the county court itself. A matter of law can be made the subject of appeal, but then only when the point has been raised at the trial before the learned judge.

Those two propositions have ever since been continually applied with regard to appeals in this court.

The action concerns a shed or garage in Builth. The plaintiff is the successor in title of one John Mason. On Mar. 30, 1921, John Mason made an agreement with the present defendant whereby John Mason agreed to let and the defendant agreed to take :

> . . . all that cottage and shed in the garden adjoining situate and being called Llanelwedd Cottage in the occupation of the defendant at a rent of 6*s*. per week rental to be payable every Monday. A

It was provided at the end as follows :

> . . . the tenancy shall be determined by the landlord giving to the tenant four weeks' notice in writing and by the tenant giving four weeks' notice in writing.

B What happened, as found by the county court judge, was that in 1923 the defendant gave up possession of the cottage, but he was allowed to remain in possession of the shed mentioned in the tenancy agreement, otherwise called the garage, and he used it for the purpose of storing his property in it, or for the purpose of putting a motor car in it. From that time onwards, he continued to use the shed, and he never paid any rent C in respect of it either to John Mason or to his successor in title. In Sept., 1940, the plaintiff, being successor in title to John Mason, took the unwarranted course, as the county court judge says, of turning the property of the defendant out of the shed, and there was apparently some trouble over that. D On Oct. 1, 1940, he gave the defendant notice to quit, which purported to be given under the agreement of Mar. 30, 1921. Subsequently, he brought these proceedings claiming possession of this garage, alleging that the tenancy agreement with the defendant had been terminated by that notice to quit. The defence set up by the defendant was under the Limitation Act, 1939, s. 4 (3), which provides as follows : E

> No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person . . .

The county court judge has found that no rent for this shed was paid F from 1923 until the notice to quit in October, 1940, and, if the plaintiff's right of action to recover this land accrued to him more than twelve years before Oct. 1, 1940, he would be prevented from bringing any action to enforce that right to recover the land by virtue of that statutory provision. The only question of law, so far as I can see, is as to when the G cause of action to recover possession of this property accrued to the plaintiff or his predecessor in title. Counsel for the appellant, in his very careful argument, ventured to suggest that no right to recover accrued to the plaintiff or his predecessor in title until Oct. 1, 1940, when he gave notice to quit. There are two difficulties about that. The first is that, H so far as one can trace from the county court judge's judgment and from any note which he took at the time or anything to which we can refer, that point of law was not taken or argued before the county court judge below. The other difficulty is this. He cannot put forward that proposition unless the defendant was, and had been ever since 1923, in possession of this garage by virtue of the tenancy agreement of Mar. 30, 1921. On the facts found and admitted, I cannot see how that can possibly be asserted. There was a surrender of the cottage, which was the main property let by that agreement. The parcels of that agreement are:

> . . . all that cottage and shed in the garden adjoining . . . at a rent of 6*s*. per week.

He gave up possession of the cottage in some manner, but retained possession of the shed, and it is suggested that he retained possession of the shed at a rent of 2*s*. per week, which was never paid. I think that it is impossible to suggest that after 1923 he was in occupation of the shed pursuant to this agreement of Mar., 1921. If he was in possession of the shed otherwise than as a trespasser, and by virtue of some agreement with the owner of the shed, it must have been by virtue of some new agreement with the owner of the shed. The terms of it, of course, are entirely unspecified, and possibly only to be implied. Whatever the terms of that new agreement, however, I think it impossible that there could be a tenancy other than the two descriptions of tenancy specified in the Limitation Act, 1939, s. 9 (1), (2)—namely, a tenancy at will or a tenancy from year to year or other period without a lease in writing. In either of those cases, such a tenancy is to be deemed to be determined at the expiration of a period of one year from the commencement thereof, unless previously determined. Therefore, whatever the nature of the tenancy agreement under which, from 1923 onwards, the defendant held this shed or garage, it was a tenancy, I think, within the meaning of these provisions, which must be deemed to have been determined at the expiration of one year from its commencement—that is, in 1924—and, upon its determination in 1924, the right of action of the plaintiff or of his predecessor in title to recover possession of the shed is to be deemed to have accrued. If that is so, the plaintiff's cause of action arose at least as far back as 1924, and sect. 4 (3) of the 1939 Act says that no action shall be brought after the expiration of twelve years from the date on which the right of action accrued to him, which would be 1936. That being so, upon the facts found by the county court judge, it appears to me that, by this statutory provision, he was compelled to hold that the defendant had made out that he was in possession of the shed, and that the plaintiff had no right to oust him from that possession. That being so, the judgment of the county court judge seems to me to have been correct. This appeal fails and must be dismissed with costs.

GODDARD, L.J.: I agree. I think that the county court judge came to a right decision in the end, although it is unfortunate that the material point never seems to have emerged at all in the court below. The plaintiff had brought his action electing to treat the defendant, not as a mere trespasser, but as a tenant. What the position would have been if he had been able to establish that the subsisting agreement between him and the defendant was the written agreement of Mar. 30, 1921, we need not pause to inquire. However, it is quite clear, as stated by MACKINNON, L.J., that that agreement was at an end, and came to an end when the defendant left the cottage. Although the county court judge seems to me not to have applied his mind to what the actual tenancy was, but to have gone on the footing that this tenancy agreement was still subsisting, in my opinion, it is quite clear that it was not, and that the A only possible tenancy agreement, if there was any tenancy agreement at all after the defendant quitted the cottage, was a verbal agreement under which he became tenant of the garage. Thereupon, the provisions of sect. 9 (2) of the Act applied. It is quite clear, therefore, that the plaintiff's cause of action arose, and his right of re-entry must be deemed B for the purpose of the Act to have arisen, at the expiration of one year from that time. The action, therefore, was clearly barred.

DU PARCQ, L.J.: I agree and have nothing to add.

Appeal dismissed with costs.

C Solicitors: *Allen & Overy*, agents for *Sydney G. Thomas*, Builth (for the appellant); *Lumley & Lumley*, agents for *H. Vaughan Vaughan & Co.*, Builth (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

HORN *v.* SUNDERLAND CORPORATION.

[Court of Appeal (Sir Wilfrid Greene, M.R., Scott and Goddard, L.JJ.), **February 17, 18, March 24, 1941.**]

Compulsory Purchase—Local authority—Land required for housing—Assessment of compensation—Compensation for disturbance of business—Notice to treat—Variance in description of property—Separate notices to treat as to land and minerals—Award of one sum—Lands Clauses Consolidation Act, 1845 (*c.* 18), *ss.* 6, 9, 16-68—*Acquisition of Land* (*Assessment of Compensation*) *Act,* 1919 (*c.* 57), *s.* 2 (1), (2), (6).

The applicant was the owner of a farm known as Springwell Farm, which the corporation were purchasing compulsorily as a building site under the powers given to them by the Housing Act, 1936. There were some gravel, sand and limestone beneath the surface of the land. The land had been used by the applicant in connection with his business of horse-breeding. For the purpose of the compulsory acquisition, the corporation had served two notices to treat, one in respect of the land and the other in respect of the minerals. The question of compensation was referred to arbitration, and the arbitrator assessed the compensation under both notices in one sum of £22,700. He stated that he did not include any sum for the disturbance of the claimant's business, because the sum of £22,700 could be realised only by selling in the open market with vacant possession. In the notices the property was described as Springwell Farm and its area stated to be 102·125 acres, and in the award it was described as Springwell House Farm and its area stated to be 102·123 acres or thereabouts, the subject of the notice to treat dated Aug. 20, 1936 :—

Held : (i) [Goddard, L.J., *dissenting*] since the value of the land as building land could only be realised by the removal of the business, compensation for disturbance could not be awarded because the value as building land exceeded the sum of the value of the land as agricultural land plus the value of the minerals plus the loss by disturbance. If the sum of these items exceeded the value as building land, then the applicant would be entitled to the difference.

(ii) the misdescription of the land was immaterial, since the governing words of the description were " the subject of the notice to treat dated August 20, 1936."

(iii) a separate assessment in respect of each notice to treat was not necessary, since, having regard to the basis of valuation, no separate element of value could be ascribed to the minerals.

Decision of Atkinson, J. ([1941] 1 All E.R. 166) *reversed on the first point.*

[**EDITORIAL NOTE.** In a dissenting judgment, Goddard, L.J., has agreed with the reasons given by Atkinson, J., in the court below. Put shortly, the reason for the dissentient view is that the decision of the majority gives no meaning to rule 6 in sect. 2 of the 1919 Act. The majority, however, have taken the view that in a case where the value of the land is increased by reason of its suitability for purposes other than those to which the vendor is putting it, he is not entitled to compensation for disturbance unless the increase in price is less than the compensation for disturbance. The matter will, apparently, be taken to the House of Lords, and it is at the moment premature to discuss these conflicting views. It will, of course, be noted that the conflict is confined to the first of the above points.

As to Compensation for Compulsory Purchase of Land, see HALSBURY, Hailsham Edn., Vol. 6, pp. 46-48, paras. 44, 45 ; and for Cases, see DIGEST, Vol. 11, pp. 291-294, Nos. 2184-2225.]

Cases referred to :

(1) *Mizen Bros.* v. *Mitcham Urban District Council* (1929), Estates Gazette Digest, 1929, p. 258 ; reprinted Estates Gazette, Jan. 25, 1941, p. 102.

(2) *Inland Revenue Comrs.* v. *Glasgow & South Western Ry. Co.* (1887), 12 App. Cas. 315 ; 11 Digest 236, case *1267 i ;* 56 L.J.P.C. 82.

(3) *Venables* v. *Department of Agriculture for Scotland*, [1932] S.C. 573 ; Digest Supp.

(4) *Jubb* v. *Hull Dock Co.* (1846), 9 Q.B. 443 ; 11 Digest 128, *174 ; sub. nom. R.* v. *Hull Dock Co.*, 15 L.J.Q.B. 403 ; 8 L.T.O.S. 293.

(5) *Buccleuch (Duke)* v. *Metropolitan Board of Works* (1872) L.R. 5 H.L. 418 ; 11 Digest 134, *215 ;* 41 L.J.Ex. 137 ; 27 L.T.1. ; *on appeal from* L.R. 5 Exch. 221.

(6) *Chamberlain* v. *West End of London & Crystal Palace Ry. Co.* (1863), 2 B. & S. 617 ; 11 Digest 140, *263 ;* 32 L.J.Q.B. 173 ; 8 L.T. 149 ; *on appeal from* (1862), 31 L.J.Q.B. 201.

(7) *Ricket* v. *Metropolitan Ry. Co. (Directors, etc.)* (1867), L.R. 2 H.L. 175 ; 11 Digest 140, *265 ;* 36 L.J.Q.B. 205 ; 16 L.T. 542 ; *on appeal from* (1865) 34 L.J. Q.B. 257.

(8) *Penny* v. *Penny* (1868), L.R. 5 Eq. 227 ; 11 Digest 129, *185 ;* 37 L.J.Ch. 340 ; 18 L.T. 13.

(9) *Lanarkshire & Dumbartonshire Ry. Co.* v. *Main* (1895), 35 L.T. 93 ; 11 Digest 126, case *k*.

APPEAL by the Sunderland Corporation, the respondents in the court below, from an order of ATKINSON, J., dated Dec. 19, 1940, and reported [1941] 1 All E.R. 166. There was also a cross-appeal by the claimant. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

Gilbert Beyfus, K.C., and *Dr. J. Charlesworth* for the appellants.

G. D. Squibb for the respondent.

Beyfus, K.C. : The judgment of ATKINSON, J., reverses the practice which has been established for at least 12 years. If the respondent is given the building value, he cannot also receive compensation for the loss of his farming business. If he claims as a farmer, and claims compensation for disturbance of his business as a farmer, the land must be assessed as farmland. If he claims compensation on the basis that the land is ripe for building purposes, he cannot claim compensation in respect of the disturbance of his business. If he sells the land for building purposes, he has to give up possession. The judge took the view that, if a man was entitled to compensation for having to give up possession in one case, he was equally entitled to compensation in the other case. *Mizen* v. *Mitcham Urban District Council* (1) makes it quite clear that the reasons given in CRIPPS ON COMPENSATION, 8th Edn., p. 271, as the basis of the judgment are incorrect. The principle set up by the appellants that the claimant was not entitled to combine in the same claim a valuation of the land upon the footing of an immediate sale of land for building purposes and also claim for disturbance of the business was approved by the Divisional Court. Therefore, the note in CRIPPS ON COMPENSATION, 8th Edn., does not represent the decision in the case. The matter is one of compensation, and the claimant cannot make what would really be a profit. *Venables* v. *Department of Agriculture for*

Scotland (3) is the latest case on the question of damages, and in that case, rr. (2) and (6) are specifically referred to. The owner is entitled to whichever is the larger sum—namely, either the valuation upon the basis of a new user or the valuation upon the basis of the old user plus compensation for disturbance. [Counsel referred to *Inland Revenue Comrs.* v. *Glasgow & South Western Ry. Co.* (2).]

Charlesworth followed on the same side.

Squibb : In *Lanarkshire & Dumbartonshire Ry. Co.* v. *Main* (9), Lord Kinnear said that the owner or occupier is entitled, not only to the market value of his interest, but also to full compensation for all loss which he has sustained by reason of the taking of the land. In *Ricket* v. *Metropolitan Ry. Co.* (*Directors, etc.*) (7), it was stated that the damages should be the same as those for trespass. The arbitrator has to consider the market value of the land and also the compensation to which an applicant is entitled for expulsion, if this takes place under statutory powers. The fallacy underlying the argument of the appellants is in seeking to compare the value of the land for agricultural purposes with its value for building purposes. Land has one market value only. Its value is what one would pay for it. If land has a value for building purposes, no prudent owner will sell it for less. The Act says that the compensation payable is to be the amount which the land might be expected to realise in the open market if sold by a willing seller. That amount cannot depend on, or be affected by, the use to which the land has previously been put. An arbitrator has to find the market value and then ascertain what the owner suffers by being turned out. The two sums must be added together and one lump sum awarded.

Beyfus, K.C., in reply.

Sir Wilfrid Greene, M.R. : On Aug. 20, 1936, the appellants, the Sunderland Corporation, served on the respondent a notice to treat in respect of 102·123 acres of freehold land known as Springwell Farm and owned by the respondent. On May 13, 1937, the appellants served on the respondent another notice to treat in respect of the sand and gravel and the upper stratum of limestone lying within and under the same land. These notices were served in connection with a compulsory purchase by the appellants under the Housing Act, 1925, s. 64, and they were preceded by the usual order made by the corporation and confirmed by the Minister of Health in accordance with the provisions of the Housing Act, 1925, Sched. III. Para. 3 of that schedule provides that the order of the Minister :

> . . . shall incorporate, subject to the necessary adaptations, the Lands Clauses Acts (except the Lands Clauses Consolidation Act, 1845, s. 127) as modified by the Acquisition of Land (Assessment of Compensation) Act, 1919.

The respondent, who is a farmer, occupied the land in question as farmland, largely for pedigree horses. The sand, gravel and limestone he acquired in Mar. 1936. By his particulars of claim submitted under the earlier notice to treat, he put forward the following claims: (i) land, £47,713; (ii) amount required to induce the occupier of another farm to give immediate vacant possession (exclusive of the cost of land), £12,900; (iii) unforeseen damage arising by reason of another farm having to be A rented (to be claimed later in this event); (iv) loss on farming operations from date of notice to treat to date of dispossession, £300. Alternatively to claims (ii) and (iii), he claimed (i) injurious affection with reference to trust money in Ayres Quay business, £10,760, (ii) loss on forced sale of pedigree horses and other stock at Springwell Farm, £7,000, and (iii) loss B of farm profits—three years at £350 per annum, £1,050. The claim under head (iv) and the alternative claim (iii) were abandoned in the course of the ensuing arbitration. Alternative claim (i) proved to be devoid of foundation. The claim for £47,713 for the land was put forward by the respondent on the basis that the land was a building estate ripe for C immediate development, and should be valued as such, and not as a farm.

By his particulars of claim, submitted under the later notice to treat, the respondent claimed £1,988 for the sand and gravel and £1,491 for the limestone. The assessment of compensation was referred to Sir Charles Gott, one of the official arbitrators under the Acquisition of Land (Assess- D ment of Compensation) Act, 1919. By his award, dated Apr. 8, 1940, the arbitrator assessed the compensation payable to the respondent in respect of the subject-matter comprised in both notices to treat at the sum of £22,700. No separate assessment was made in respect of the sand, gravel and limestone. The evidence on both sides was to the effect that, E if they had to be considered as likely to be worked, it would be impossible to get building value for the surface of the farm. The award contained the following paragraph:

> The said sum of £22,700 does not include any sum as compensation for the disturbance of the claimant's business by reason of his dispossession of the land. I find that the sum so assessed could not be realised by a willing seller in the open market F unless vacant possession were given to the purchaser for the purpose of building development.

On May 16, 1940, the respondent served a notice of motion asking that the award might be remitted for the reconsideration of the arbitrator, on the ground that there were errors of fact and law apparent on the face G of the award in three respects. Two of these (Nos. 1 and 3) relate to the cross-appeal, with which I will deal later. The other alleged error (No. 2) was stated to be as follows:

> The reason given by the arbitrator for not awarding any sum by way of compensation for consequential damage is erroneous in law.

H The motion was heard by ATKINSON, J., who rejected the respondent's objections Nos. 1 and 3, but ordered that the award be remitted to the arbitrator for reconsideration, with the direction to assess the loss occasioned by the disturbance of the respondent's business. It is from this order that the main appeal is brought. It raises a question of some nicety and considerable importance.

It is not disputed that the sum of £22,700, which is at the rate of £220 per acre, was arrived at upon the footing that the land was building land, and is far in excess of the value of the land considered as agricultural land. As I have already stated, the respondent claimed that the land should be valued on the footing that it was building land, and this was accepted by the appellants.

The basic argument on behalf of the appellants may best be summarised by quoting an extract from the points submitted by the acquiring authority in *Mizen Bros.* v. *Mitcham Urban District Council* (1), to which reference will be made later in this judgment. In that case, a similar point to that now in issue arose with regard to a market-garden business, and the language of the extract is as follows:

> That the claimants were not entitled to combine in the same claim a valuation of the claimants' land upon the footing of an immediate sale for building purposes with vacant possession and a claim for disturbance and consequential damage upon the footing of interference with a continuing market-garden business.

This argument was accepted by the Divisional Court, but it is argued on behalf of the respondent that the decision was in that respect wrong in law.

The Acquisition of Land (Assessment of Compensation) Act, 1919, introduces certain new rules to be followed in assessing compensation where land is being acquired by a government department or by a local or public authority. Subject to these rules, and to certain other provisions of a procedural nature, the Lands Clauses Acts remain applicable in the present case (sect. 7 (1), and the Housing Act, 1925, Sched. III, para. (3)). Apart from injurious affection, the question which a jury under the Lands Clauses Acts and an arbitrator under the Act of 1919 has to answer is what price ought to be paid to the owner for the land which is being compulsorily acquired, price and compensation being the same thing under different names: *Inland Revenue Comrs.* v. *Glasgow & South Western Ry. Co.* (2). It became the practice under the Lands Clauses Acts to ask the jury to deal separately with the elements into which the price was capable of being split, although there was in strictness no necessity to do this, since the price to be paid was a global sum. The principles upon which the price or compensation payable for the land acquired fell to be ascertained were settled by a long series of decisions, and were extremely favourable to the landowner. The broad principle was that the price should be fixed on the basis of the value to the owner, and this involved taking into consideration a number of matters which I need not mention, as they are well-known. One element which the jury was entitled to take into consideration, however, was the damage suffered by the owner from disturbance, for example, of his business. It is important, in considering the present case, to remember that this was not a separate head of compensation, such as compensation for injurious affection, but was merely one of the elements going to build up the purchase price to which the owner was fairly entitled in all the circumstances of the case. In his able argument, counsel for the respondent maintained that, under the Act of 1919, the value of the land and compensation for disturbance must be considered as two distinct matters—in watertight compartments, so to speak—in respect of each of which the landowner is entitled as a matter of law to have a sum awarded for A compensation and that the question whether compensation for disturbance should be awarded cannot in any way be affected by the nature and amount of the sum arrived at in respect of the value of the land. This argument, in my opinion, would have been incorrect if the case had been one under the Lands Clauses Acts alone, for it does not appear to B me consistent with the decision in *Inland Revenue Comrs.* v. *Glasgow & South Western Ry. Co.* (2), but it must be seen whether the position is different in a case under the Act of 1919, to a consideration of which I now turn.

The Act of 1919 provides in sect. 1 (1) for the reference of " any question C of disputed compensation " in cases to which the Act applies, and sect. 2 lays down certain rules in accordance with which the arbitrator is to act " in assessing compensation." These rules in a number of respects alter the principles governing the assessment of compensation which had been established by judicial interpretation under the Lands Clauses Acts. D The principal rule to be considered in the present case is r. (2), which provides as follows :

> The value of the land shall, subject as hereinafter provided be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise : Provided always that the arbitrator shall be entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the E claimant.

It will be seen at once that this principle of valuation differs from that adopted under the Lands Clauses Acts, since the test adopted is that of a willing seller in the open market. Had the matter stood there, it would appear that the price or compensation to be paid for the land would have F had to be ascertained without giving any consideration to the loss suffered by the owner through disturbance. However, r. (6) provides as follows :

> The provisions of r. (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

G Rule (6) does not confer a right to claim compensation for disturbance. It merely leaves unaffected the right which, before the Act of 1919, the owner would have had in a proper case to claim that the compensation to be paid for the land should be increased on the ground that he had been disturbed. It is true that the arbitrator now cannot well avoid doing H what a jury under the Lands Clauses Acts was not bound to do—namely, arrive at one figure for the value of the land and (in a proper case) another figure for disturbance—but these two figures are still, in my opinion, merely the elements which go to build up the global figure of price or compensation payable. The sum of them would be the proper figure to be inserted in a conveyance, and stamp duty would be paid upon it at the rate appropriate to the purchase money payable upon a conveyance on sale, as was the case under the Lands Clauses Acts: *Inland Revenue Comrs.* v. *Glasgow & South Western Ry. Co.* (2). In view of these considerations, I cannot accept the argument of counsel for the respondent. I have set them out at length, since they have an important bearing upon the question which we have to decide. The truth of the matter is that, as in cases under the Lands Clauses Acts alone, so in cases where the Act of 1919 applies, the sum to be ascertained is in essence one sum—namely, the proper price or compensation payable in all the circumstances of the case. If those circumstances are such as to make it impossible for the owner to claim that he has suffered damage through disturbance for which he ought to be compensated, then he is not entitled to have the price or compensation for his land increased by an addition for disturbance, even if he has in fact been disturbed. It is a mistake to construe rr. (2) and (6) as though they conferred two separate and independent rights, one to receive the market value of the land and the other to receive compensation for disturbance, each of which must be ascertained in isolation.

In the present case, the respondent was occupying for farming purposes land which had a value far higher than that of agricultural land. In other words, he was putting the land to a use which, economically speaking, was not its best use, a thing which he was, of course, perfectly entitled to do. The result of the compulsory purchase will be to give him a sum equal to the true economic value of the land as building land, and he thus will realise from the land a sum which never could have been realised on the basis of agricultural user. Now he is claiming that the land from which he is being expropriated is to be treated, for the purpose of valuation, as building land, and, for the purpose of disturbance, as agricultural land, and he says that the sum properly payable to him for the loss of his land is (i) its value as building land, plus (ii) a sum for disturbance of his farming business. It appears to me that, subject to a qualification which I will mention later, these claims are inconsistent with one another. He can realise the building value in the market only if he is willing to abandon his farming business in order to obtain the higher price. If he claims compensation for disturbance of his farming business, he is saying that he is not willing to abandon his farming business—that is to say, that he ought to be treated as a man who, but for the compulsory purchase, would have continued to farm the land, and, therefore, could not have realised the building value.

Approaching the matter from rather a different angle, I may put the question thus. Is the sum fixed as the value of the land, without any addition for disturbance, sufficient to compensate him for the loss which he suffers by having his land taken from him? In my opinion, this question must be answered in favour of the appellants, subject to the qualification mentioned above. Some examples will illustrate my meaning and support my conclusion. Let me take the case of a farmer who is voluntarily selling his land. First of all, I will assume that the land is merely agricultural land, fetching, as such, a price in the market which I will take as £10,000. If he sells this land and is minded to continue farming elsewhere, it will in one way or another cost him, say, £2,000 to move to another farm, and, if that farm costs £10,000, he will be £2,000 the worse off. If the case were one of compulsory purchase, it would be obvious that, unless he were to receive £2,000 for disturbance, he would to that extent have been damnified. Now let me assume that the land is building land and that he sells it for £20,000. If he is minded to continue farming and purchase another farm for £10,000, and if he spends and loses £2,000 in moving, he is £8,000 better off than he would have been if he had continued to farm on the land. If the purchase were a compulsory one and he were awarded £2,000 for disturbance in addition to the £20,000, he would be £10,000 better off. In such a case, the £2,000 is not an element of loss at all, but merely a diminution of the profit which he obtained by giving up an uneconomic use of the land and realising its true economic value. It is true that, while he is using the land for farm purposes, notwithstanding that user, the land has its building value, which he can realise at any monent at which he chooses to do so, but this is beside the point. The extra price which he could realise could be realised only by ceasing to farm the land, and would more than compensate him for what it would cost him as a farmer to move to another farm if he were minded to do so.

Counsel for the respondent pointed out that there are not two values under r. (2), building and agricultural, but one value only, and it is to this value that the owner is entitled. This is no doubt true ; but it is not for the purpose of r. (2) that agricultural value comes into the picture, but (as will be seen later) for the purpose of r. (6), since the object of ascertaining it is to enable the arbitrator to see whether the owner can be said to suffer damage for disturbance of his farming business in view of the amount assessed for the value of the land under r. (2). It was also said by counsel for the respondent that, if he was wrong in his contention, results would follow which the legislature could not have intended. As an illustration of his point, I may take the case of land which, at the time of acquisition, has a potential value as building land which gives it a value, say £11,000, rather higher than would have been the case if it had been purely agricultural, say £10,000. If by disturbance the owner suffers a loss of £2,000, and if nothing is to be awarded in respect of such disturbance, the owner will be damnified. The reasoning which appeals to me does not, however, lead to any such result. In such a case, the loss by disturbance, in my judgment, would be £1,000, and, if the owner moved to another farm costing £10,000 and spent or lost £2,000 in the process, he would be completely indemnified by receiving £11,000 for the value of the land and £1,000 for disturbance. If he received an additional £1,000 for disturbance, he would be receiving profit, not compensation.

Another illustration may be taken from the case of two adjoining owners of similar plots of land ripe for building, of whom one has left his land uncultivated while the other has brought his to a high state of cultivation. It is said that to give the same figure of compensation to each of them would be unjust, since the industrious owner would lose the benefit of his cultivation as well as his land, and it would cost him money to obtain land in as good a state of cultivation. In my opinion, however, A this is a fallacy. It would not be that the industrious owner would suffer a loss which the other did not. If he was minded to acquire another farm and to spend part of his purchase money in moving into it, the money so spent would represent, not loss, but expenditure of part of the profit realised by the cessation of his farming activities on the land taken and the B perception of its value as building land.

In *Mizen Bros.* v. *Mitcham Urban District Council* (1), the same point as that which arises here was decided in favour of the acquiring authority by a Divisional Court consisting of LORD HEWART, L.C.J., and AVORY and BRANSON, JJ. We have been furnished with a transcript of the argument C and the judgment in the case. There was no reasoned judgment, but the considerations which influenced the members of the court sufficiently appear from their interlocutory observations. In that case, the land was used as a market garden, and was in a high state of cultivation. It had erected upon it greenhouses and other trade fixtures. The value D of the land (including greenhouses and fixtures) as market-garden land did not exceed £12,000. The land was ripe for immediate development for building, and on that basis was valued by the arbitrator at £17,280, a sum which could be realised only if vacant possession were given, the seller being at liberty to remove the greenhouses etc. and plants and E crops. The arbitrator assessed the value of tenant right, fixtures and disturbances (assuming that the owners were entitled to claim it) at £4,640, which sum, when added to the valuation of £12,000 on a market-garden basis, fell short of the value assessed on a building basis. The question submitted by the arbitrator for the opinion of the court was as follows: F

> Whether the claimants are entitled to receive compensation in respect of the greenhouses and other trade fixtures, forced sale or removal of crops and plants, and compensation for disturbance and loss of business, in addition to the amount which the land if sold in the open market by a willing seller to a willing buyer with vacant possession might be expected to realise.

This question the court answered in the negative, and, in my opinion, G rightly so. It is worth pointing out that the statement of the reasons for this decision given in CRIPPS ON COMPENSATION, 8th Edn., p. 271, is not accurate, and it appears to have misled ATKINSON, J., who did not enjoy the advantage of having this transcript before him. The basis of the judgment of ATKINSON, J., is to be found in the proposition that the H respondent had "two assets—first, land worth £22,700 and secondly, a business worth so much." This, of course, is true in one sense, but the two values could not be realised at the same time. The respondent could not farm and build as well. The only way in which he could realise the building value was by giving up farming on the land, and the only way in which he could enjoy the farming value was by refraining from realising its building value. By farming on building land he was, economically speaking, indulging an idiosyncrasy without any economic justification. By claiming for disturbance, he is asking to be compensated, not for any real pecuniary damage, but for the loss of the opportunity to indulge his idiosyncrasy. If he were to spend the £22,700 in buying other building land for the purpose of farming it, and received, say, £4,000 in respect of disturbance, he would in one sense be in precisely the same position after the transaction as he was before. That is to say, he would be installed as a farmer on land the value of which in the market far exceeded its value as based on its actual user. In other words, he would have received a payment sufficient to enable him to indulge what I have ventured to call his idiosyncrasy, while all that he is entitled to is compensation for pecuniary loss, which is a different matter altogether.

From what I have said above, it will appear (and this is the qualification which I have mentioned) that, in my opinion, the respondent is disentitled to an award for disturbance only if the sum of £22,700 equals or exceeds the value of the land based on the hypothesis that it will be used only for farming purposes, plus whatever value should be attributed to the minerals, plus the loss by disturbance. To the extent (if at all) that the sum of these figures exceeds the sum of £22,700, compensation should be awarded. The arbitrator did not deal with this question, which, in view of the very high valuation of the land, may perhaps be academic. However, I express no opinion upon that, since the respondent is anxious to have this aspect of the matter considered by the arbitrator at his own risk as to costs. I would refer the matter back to the arbitrator, with a direction (i) to ascertain (*a*) the value of the land considered as purely agricultural land with minerals in it, and (*b*) damages for disturbance, (ii) to award to the respondent, if the sum of these two items exceeds the sum of £22,700, an additional sum equal to such excess, and (iii) to deal with the costs of the further proceedings before him. It is necessary to include the minerals in the inquiry because, on the basis of agricultural user of the land, they, or part of them, may have an independent value, which cannot be the case if the land is regarded as building land.

The cross-appeal can be dealt with quite shortly. The first objection is that the property is not correctly described in the award, and does not agree with the notices to treat. In the earlier notice to treat, the acreage is given as "102·123 acres of land," while in the later notice it is given as "102·123 acres or thereabouts." In the award the land is described as ". . . 102·123 acres or thereabouts in extent the subject of notice to treat dated Aug. 20, 1936," and the minerals as being "within and under the surface of the land described above the subject of notice to treat dated May 13, 1937." It is said that the award contains an error on its face, in that the acreage of the land given in the award contains the words "or thereabouts," which are not to be found in the relevant notice to treat. There is nothing in this point. The governing words in the description contained in the award are "the subject of notice to treat dated Aug. 20, 1936," and these words are sufficient to correct the alleged misdescription. The other objection is that the award does not specify a separate assessment in respect of each notice to treat. This point also has no substance. Having regard to the basis of the valuation, no separate element of value could properly be ascribed to the minerals. A The cross-appeal must accordingly be dismissed with costs.

SCOTT, L.J.: The facts have been sufficiently stated by SIR WILFRID GREENE, M.R. I agree with his conclusions of law, and with his statement of, and comments upon, *Mizen Bros.* v. *Mitcham Urban Disrtict* B *Council* (1), and in essence my reasoning is the same as his, but, as I have followed a slightly different route, I will state my own reasons.

The question raised by the appeal is not free from difficulty, for it is not easy to formulate the general principle upon which the answer must depend. The main object of the Act of 1919 was undoubtedly to mitigate C the evil of excessive compensation which had grown up out of the theory, evolved by the courts, that, because the sale was compulsory, the seller must be treated by the assessing tribunal sympathetically as an unwilling seller selling to a willing buyer. The word "compensation" almost of itself carried the corollary that the loss to the seller must be completely D made up to him, on the ground that, unless he received a price which fully equalled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice. The 1919 Act by its abolition of the 10 per cent. addition for compulsory purchase by sect. 2 (1), and by its special rules in subsects. (3) (4) and (5), undoubtedly contributed to E the intended reform, but perhaps the provision which was most likely to check exaggerated prices for the land sold was the reversal by subsect. (2) of the old sympathetic hypothesis of the unwilling seller and the willing buyer, which underlay judicial interpretation of the 1845 Act. It was argued before us for the respondent seller that, whatever the law F had been before, the effect of subsect. (6) was to create a general right to compensation for "disturbance," and such other matters as are covered by the general words of that subsection, over and above the price of the land taken, and that it was the statutory duty of the assessing tribunal, whatever the basis of valuation upon which the price had been calculated, G to add this figure to the valuation of the land in order to ascertain the total compensation. I do not accept that contention, for I agree with the opinion of the Lord Justice-Clerk, in *Venables* v. *Department of Agriculture for Scotland* (3), at p. 579, that subsect. (6) confers no new rights, although it manifestly purports to save existing rights. The subsection deals with H other matters besides "disturbance," but that topic will serve as typical. The subsection appears to me to have been inserted for two purposes, one general and the other particular—general in order to prevent misconception as to the scope of alteration effected by subsect. (2) in the previous judicial basis for ascertaining the market value to the owner of the land sold, and particular in order to forestall the argument that a willing seller must in law be presumed to have moved out voluntarily in order to give vacant possession to the buyer. If these be the operative effects of the subsection, the legal right to compensation for disturbance stands to-day where it did before the Act of 1919. In those cases where it was formerly payable, it is still payable. In those where it was not payable, it is not payable to-day. It is, however, perhaps well to add a cautionary note to that rather sweeping statement. Subsect. (6) does not purport to give statutory validity to every pre-1919 judicial determination on the subject of "disturbance," still less to perpetuate exaggeration in the practice of juries or arbitrators. The sums given even in some of the reported cases seem to predicate an almost punitive measure of damages for eviction by compulsion of law. In my view, there never was anything in the 1845 Act to warrant such indulgence to the dispossessed owner, and I know of no decision perpetuating any such generosity to the owner at the expense of the promoters which would be binding on us. Nor is there anything in sect. 2 (6) of the 1919 Act to compel us to follow a practice in either jury or arbitral assessments, if there was one, of giving to the dispossessed owner an amount of compensation which exceeds the total sum of his real loss arising from the acquisition. Such a practice would now, as it did before, contravene the basic principle of compensation.

On the facts of the present case, the claim for disturbance, in my opinion, would never have been in law exigible and its exclusion from the award would always have been—and, therefore, still is—proper. The 1919 Act being disregarded, the question falls to be considered solely under the Act of 1845. If so, I ask myself how the respondent can be entitled to a money payment by way of compensation for disturbance of his farm on top of a price ascertained by valuing the whole of the land as land *immediately* ripe for building development, and thus producing a figure many times greater than the market value of it as a farm. *Ex hypothesi*, the building value is realisable only if and when the land is offered in the market as building land, which necessarily postulates that the selling owner will have given up his farm and cleared the land of all its farm buildings, stock and implements, or at least is ready and willing to do so at his own expense. Conversely, in so far as he chooses to leave that task to be performed by the purchaser, he must submit to the deduction of the cost of it from his price.

This broad view is, I think, fully borne out by the detailed provisions of the Act of 1845. That Act was a consolidation of standard clauses usually inserted in private Acts, as appears from its title and preamble. It possesses two leading features. The first is that what it gives to the owner compelled to sell is compensation—the right to be put, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater. The other is that the legislation recognises only two kinds or categories of compensation to the owner from whom land is taken—namely, (i) the fair value to him of the land taken, and (ii) the fair equivalent in money of the damage sustained by him in respect of other lands of his, held with the lands taken, by reason of severance or injurious affection. For compulsory acquisition, those are the only two kinds of statutory compensation. There is a third kind given by sect. 68 of the Act, but that has nothing to do with compulsory acquisition. It is a remedy for injuries caused by the works authorised by the Act to the lands of an owner who has had none of his land taken in that locality. The remedy is given because Parliament by authorising the works has prevented damage caused by them from being actionable, and the compensation is given as a substitute for damages at law. The rights conferred by sect. 68 have no direct or positive relevance to the question we have to decide, but, negatively, the section is important, just because there is nothing in it, in my opinion, which bears on our question. Whether the words " taken for or " in the second line of sect. 68 have any meaning or were a mere clerical error it is unnecessary in the present case to speculate, for it is notorious that sect. 68 has always been construed as applying *only* to land *not* held with lands taken. I say no more, therefore, about sect. 68.

I come now to the essential point. As I have already indicated inferentially, there is in the 1845 Act no express provision giving compensation for disturbance, or for any of the similar matters to which sect. 2 (6) of the 1919 Act refers—which for brevity I will treat as included in the word " disturbance," the more suitably so as the claim in issue in the appeal is for disturbance proper. If I am right in saying that the Act expressly grants only two kinds of compensation to an owner who has land taken—namely (i) for the value to him of the land, and (ii) for injurious affection to his other land—it is plain that the judicial eye which has discerned that right in the Act must inevitably have found it in (i), that is, in the fair purchase price of the land taken, and that conclusion is consonant with all the decisions, so far as I can discover.

The Act is very loosely drawn, and there is little attention paid in it to accuracy of language, but in regard to the scope and purpose of the grant of compensation for the value of the land taken or purchased from an owner there is no ambiguity. It may parenthetically be noted that the words " purchased " and " taken " are used as synonyms. The owner is given a purchase price for the land taken which will " compensate " him for the compulsory sale. " Compensation " for " damage sustained " is expressly conferred as a separate right, and is conferred only in respect of the owner's other lands. No express provision is made anywhere in the Act about damage sustained by him in respect of his ownership or possession of the land taken.

I will now refer shortly to the relevant sections. Power is given by sect. 6 to purchase by agreement " for a consideration in money." Sect. 9 (a section dealing with vendors under disability) speaks of " the purchase money or compensation to be paid for any lands to be purchased or taken." Sects. 16-68, inclusive, are headed "and with respect to the purchase and taking of lands otherwise than by agreement." Sect. 18 provides for a written notice of the promoters' intention to take land (the "notice to treat"), which must state :

> . . . that the promoters . . . are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works.

Thus a plain distinction is drawn between price and damage, and between acquisition of land and execution of works. The first distinction is repeated and further explained in sect. 38, which requires the promoters before summoning a jury to make an offer saying "what sum of money they are willing to give" under each of the two heads of compensation—namely, (i) purchase of the land, and (ii) damage to be sustained by execution of the works. Sect. 49, which relates only to assessment by a jury, requires the jury to "deliver their verdict separately" for the purchase money :

> . . . and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith.

The definition of "the damage that may be sustained . . . by reason of the execution of the works," for which compensation is payable, is still further defined in this section by limiting it to the case of "other lands of such owner." Sect. 63, which relates to assessments made, not by juries, but by arbitrators (and justices or surveyors), contains a similar reference to "the other lands" of the owner, but makes it still more explicit by inserting the word "other" before the word "land," not only in respect of severance, but also in respect of injurious affection. These extracts from the only relevant sections show clearly that a claim for disturbance connected with the land taken must be made as part and parcel of the claim for purchase money. It cannot come under the head of compensation for severance or for injurious affection to the *other* lands of the owner, and the statute knows no *tertium quid* in the way of compensation. None the less, the owner in a proper case—namely, in a case where he really does incur a loss of money by disturbance due to the taking over and beyond the loss for which he is to be reimbursed in respect of the land taken—is entitled, because it has to do with the land, to have that element of personal loss taken into the reckoning of the fair price of the land, as has been held by the courts from a very early stage. *Jubb* v. *Hull Dock Co.* (4) was decided upon the language of a private Act passed in the session before that in which the Lands Clauses Consolidation Act, 1845, was passed, but its provisions have in more than one reported case been judicially regarded as similar in effect to those which I have quoted from the 1845 Act—for example, by BLACKBURN, J., in the Exchequer Chamber in *Buccleuch* (*Duke*) v. *Metropolitan Board of Works* (5), at p.

241, and by Blackburn, J., in *Chamberlain* v. *West End of London & Crystal Palace Ry. Co.* (6) (a case under sect. 68), at p. 204. Moreover, in *Ricket* v. *Metropolitan Ry. Co.* (*Directors, etc.*) (7), Erle, C.J., at p. 261, recognised *Jubb's* case (4) as *in pari materia* with the case of a claim under the Act of 1845 for compensation for personal damage in respect of the land taken. His *obiter dictum* was as follows, at p. 261 :

> As to the argument, that compensation is in practice allowed for the profits of the trade where land is taken, the distinction is obvious. The company claiming to take land by compulsory process, expel the owner from his property, and are bound to compensate him for all the loss caused by the expulsion ; and the principle of compensation, then, is the same as in trespass for expulsion ; and so it has been decided in *Jubb* v. *Hull Dock Co.* (4). There a brewery had been taken by the defendants, and the plaintiff claimed to be compensated for the loss of his business as a brewer ; and the court held that he was so entitled, expressly on the ground that the premises had been taken.

Whilst accepting nearly everything there said, I venture respectfully to doubt the completeness of the analogy of damages for trespass. In *Jubb's* case (4), the jury awarded the claimant £400 for the land taken—business premises—and £300 for disturbance of his business there carried on. A rule *nisi* for a *certiorari* had been obtained to quash the verdict, on the ground that the claim for disturbance was not authorised by the statute. Counsel showing cause submitted as follows :

> . . . the award for compensation for damage is correct. The intention of the legislature clearly was that the party giving up his property should be placed (so far as money could do it) in the same situation as before. Justice would not be done if the party resigning a business which is valuable to him and might render the property valuable to a purchaser should receive only the bare worth of the land. This additional value may indeed be properly considered an element in the price of the estate purchased.

All possibly relevant sections of the Act are set out in the report. It is true that some of them contained certain additional words about compensation for damage which were not very clearly limited to the case of *other* lands, but the court treated sect. 117 as the only really material section (see the first paragraph in the judgment of the court delivered by Lord Denman, L.C.J., at p. 454), and that section is in effect identical with sect. 49 of the general Act of 1845. The decision has always been treated as an authority for the proposition that compensation for personal loss to the owner arising out of the eviction by statutory title is to be regarded as recoverable, if at all, only as an element in assessing the price to be paid for the land taken.

For that proposition, since 1887 there has been the authority of the House of Lords in *Inland Revenue Comrs.* v. *Glasgow & South Western Ry. Co.* (2). A timber merchant's premises at Greenock were acquired compulsorily. A special jury assessed the compensation under sect. 48 of the Scottish Act (which is identical with sect. 49 of the English Act) at £52,658, including in that figure £9,499 for loss of business. The conveyance was presented to the Commissioners for stamping, and they were of opinion that the £9,499 was part of the consideration for the sale. The First Division of the Court of Session held the contrary, but the House of Lords took the same view as the Commissioners. The opinion of LORD HALSBURY, L.C., covers much of the ground necessary to our decision. He said, at p. 320 ;

> The parties may if they please agree, but if they do not agree the price is to be ascertained as between them, and two subjects-matter are dealt with by the statute —one the value of the property so taken, and the other the question of severing A the property so taken from the lands held therewith.

He cited sect. 48, and added, at pp. 320, 321 :

> The two things, and the only two things, which are within the ambit and contemplation of the statute, are the value of the lands and such damages as may arise to other lands held therewith by reason of the particular land which is taken being taken from them. Now, my Lords, that seems to me to be at the foundation of the B whole argument. That was alone what the jury in this case had power to assess, because it is admitted that no question arises here upon the other part of the section —no question arises here about any damage from severance. It is admitted, therefore, impliedly, that the only thing which the jury had here to assess was the value of the land. . . . We, however, must be guided by what the language of the legislature is. Now the language of the legislature is this — that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels C him to do so) may be naturally and properly and justly taken into account ; and when such phrases as "damages for loss of business" or "compensation for the goodwill" taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business ; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who D have to assess the compensation.

Then LORD WATSON said, at p. 322 :

> As I read these provisions, the statute authorises, in the first place, compensation for land, or an interest in land. By "compensation," is meant an equivalent for that which the railway company take and acquire, and which the proprietor gives up to them.

E The case finally establishes two principles. The first is that compensation for disturbance is just an element in the price of the land, and the second, upon which LORD WATSON based his opinion, is that [p. 322] :

> . . . By "compensation" is meant an equivalent for that which the railway company F take and acquire, and which the proprietor gives up to them.

They are both of importance in the decision of the present appeal.

There is one further principle which has some slight relevance to the question before us, and that is the moment of time at which the price of the land to be taken has to be ascertained. It is when the notice to G treat was given. As WOOD, V.-C., said in *Penny* v. *Penny* (8), at p. 236 :

> The scheme of the Act I take to be this, that every man's interest shall be valued *rebus sic stantibus*, just as it occurs at the very moment when the notice to treat was given.

It may be convenient to summarise the legal principles on which I H base my conclusion that the Official Arbitrator was right (subject to one very improbable possibility) on the facts before him in refusing to add any claim for disturbance to the price he awarded for the value of the land itself. (1) *Prima facie*, the purchase price for the land to be taken pursuant to the notice to treat is the market value of the land, and whether to an unwilling or willing seller is, for this principle, so far as concerns that value, irrelevant. (2) The estimation of that value must take into account future and potential value, including what is known as "special adaptability." (3) It must be ascertained as at the moment when the notice to treat was given. (4) The rule of market value necessarily presupposes the presence of the seller in the market, there offering his land for sale in a normal state for that market—namely, in a condition A to attract the ruling price there. If its state is better than normal, it should attract a better price. If it is worse than normal, or if the buyer will have to spend money in order to bring it up to normal, the seller must expect a reduction on the normal price. (5) In the case of a sale by private treaty or auction, the seller cannot put in his pocket more than B the net market value. He can recover no loss to which he is put by his decision to part with his land. (6) On a compulsory sale, however, the principle of compensation will include in the price of the land, not only its market value, but also personal loss imposed on the owner by the forced sale, whether it be the cost of preparing the land for the best market C then available or incidental loss in connection with the business he has been carrying on, or the cost of reinstatement. Otherwise, he will not be fully compensated. (7) Here we come to the other side of the picture. The statutory compensation cannot and must not exceed the owner's total loss, for, if it does, it will put an unfair burden upon the public D authority or other promoters, who on public grounds have been given the power of compulsory acquisition, and it will transgress the principle of equivalence which is at the root of statutory compensation, which lays it down that the owner shall be paid neither less nor more than his loss. The enunciation of this principle—the most fundamental of all—is easy E enough. Its justice is self-evident, but its application to varying facts is apt to be difficult. It is not easy to spell out of it a general criterion which will afford a practical test in all cases. Let me try to illustrate the difficulty. A farmer sells his land with its farm buildings by private treaty, not intending to farm any more. The land is sold and bought F as agricultural land, so that it will fetch in the market only agricultural value. The farmer may sell his stock, implements, etc., but he will get nothing for his loss by "disturbance" out of the purchaser. If the same farmer-owner is compelled by law to sell, the statutory principle of equivalent compensation entitles him to recover his personal loss arising out of G the compulsory sale in addition to the agricultural value of the land. Suppose, however, that his land has potential building value. As a result of the statutory compulsion by the notice to treat, he is forthwith put in a position where he is entitled as at that moment to be paid the present building value of the land. If the land is "ripe for development," H that value will represent a sum of money many times as great as the agricultural value. If he had sold voluntarily, he would have had to set off his "disturbance" loss against the purchase price in order to ascertain the net price realised. How can it be said that by the compulsory acquisition he has been caused a loss which is not fully compensated by the present payment of full building value? In my opinion, there is nothing in either Act to give him anything further. I think that it is a false interpretation of the Acts to suppose that, in all circumstances, and whatever the evidence, such a loss must, as a matter of law, be added to the actual price of the land in order to ascertain its legal price under the Act. Where, by reason of the notice to treat, an owner is enabled to effect an immediate realisation of prospective building value, and thereby obtains a money compensation which exceeds both the value of the land as measured by its existing user and the whole of the owner's loss by disturbance, to give him any part of the loss by disturbance on top of the realisable building value is, in my opinion, contrary to the statutes.

It is not necessary for the present appeal to say more than that, on the facts before us, the Official Arbitrator was probably right, or at least may well have been right, in refusing to add anything for disturbance to the figure of building-land value. In so far as his decision was one of fact, we could not alter it if we would. If we were entitled to take judicial notice of the fact that the agricultural value is so small a percentage of the building value given by the Official Arbitrator that the total of agricultural value plus disturbance is below the Official Arbitrator's figure, we could dismiss the appeal, but I regret that we are not entitled to do that, and, as the respondent was not willing to concede that point of fact, I think that the award must be remitted for the Official Arbitrator to deal with in the light of the judgments of Sir Wilfrid Greene, M.R., and myself. I have read with care the judgment of Goddard, L.J., but, in so far as his reasoning and conclusion differ from mine, I respectfully disagree. I agree with the orders proposed by Sir Wilfrid Greene, M.R., both on the appeal and on the cross-appeal.

Goddard, L.J.: The award which is the subject of this appeal was made in an arbitration under the Acquisition of Land (Assessment of Compensation) Act, 1919. The corporation desired to acquire the claimant's farm for housing purposes, and served notices to treat accordingly. Under the Housing Acts, 1925-30, compensation is to be assessed under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, and the question which falls for decision depends, in my opinion, on the true construction of sect. 2 of that Act. The claimant sought compensation, not only for the land taken, but also for the disturbance of his business as a farmer and horse-breeder, and the latter claim has been rejected. The arbitrator has stated on the face of his award his reason for rejecting it, which is that the sum awarded could not be realised by a willing seller in the open market unless vacant possession were given by the purchaser for the purpose of building development. Atkinson, J., has held that the arbitrator was wrong in rejecting the claim for disturbance, and I agree with him.

To determine the question, it is necessary, I think, to consider what the law was before the Act of 1919 was passed. Under the Lands Clauses Consolidation Act, 1845, where land is compulsorily acquired, compensation can be claimed in respect of three matters—namely, (i) for the value of the land taken, (ii) for injury done, or to be done, to the lands held therewith, commonly called severance, and (iii) for land or any A interest therein injuriously affected by the execution of the works. The Act nowhere in terms refers to compensation for loss by disturbance, but it has always been held that, in assessing the value of the land it is the value to the owner which has to be ascertained, and elements in the value to him are that he was carrying on business on the land which he was B forced to sell and that he will have to move out of the house where he has been living. In *Ricket* v. *Metropolitan Ry. Co.* (*Directors, etc.*) (7), ERLE, C.J., delivering the judgment of the Exchequer Chamber, put the matter thus :

> The company claiming to take land by compulsory process expel the owner from his property and are bound to compensate him for all the loss caused by the expulsion ; and the principle of compensation then is the same as in trespass for expulsion ; and so it has been decided in *Jubb* v. *Hull Dock Co.* (4). There a brewery had been taken by the defendants and the plaintiff claimed to be compensated for the loss of his business as a brewer and the court held that he was so entitled. C

It became the common practice to claim, and for juries and arbitrators to assess, two separate sums, one for the land and another for the disturbance, D but it was decided in the House of Lords in *Inland Revenue Comrs.* v. *Glasgow & South Western Ry. Co.* (2) that, while this division was a convenient method of enabling the jury to ascertain what was proper to be paid, the aggregate, however arrived at, was purchase money or compensation, and was awarded as such. Thus it will be seen that, E while disturbance, which includes loss of business, was not mentioned *eo nomine* in the Act, it was a very real element to be taken into account in determining what the owner was to receive by way of compensation. The right to be compensated for his disturbance is provided by the Act of 1919. F

The Act of 1919 relates to the acquisition of land by the government or by local or public authorities. That is to say, it relates to the acquisition of land for public purposes. It substitutes an official arbitrator for any other tribunal for determining compensation, and in sect. 2 lays down rules for assessment. Rule (1) abolishes any allowance (usually G 10 per cent.) which it was customary to allow because the acquisition was compulsory. Rule (2) substitutes for any other measure of value the value which any willing seller might obtain in the open market, and, as it has always been the law that the value is to be ascertained as at the date of the notice to treat, it follows that the value is the market value at that H time. So far, the owner, however unwilling he may be to sell, is to be treated as though he had himself put his land up for sale. Rules (3), (4) and (5) are immaterial to the present case, but it is r. (6) which raises the question which has to be determined here. That rule states that the provisions of r. (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land. The latter words would clearly include severance. It seems to me that, while rr. (1) and (2) require that, in assessing the actual value of the land, the owner is to be regarded as a willing seller, r. (6) recognises that in fact he is not. If the owner of a house puts it up for sale, he knows that, to obtain the market price, he must give vacant possession, and he will not expect to get, in addition to the price, a sum to compensate him for the expense of removal. Disturbance implies that something is taking place against the will of the person disturbed. If an owner is expelled from his house, the expense he is put to in removal is in no way connected with the value of his house. It is a loss which he has suffered, as it seems to me, by being expelled, whatever the value of the house may be.

The main argument which was addressed to us, as I understand it, was this. It was said that the claimant was occupying his land as a farm, that he has been awarded compensation on the basis that the farm was a building estate, and could realise that value only by giving possession for building, and that, therefore, he must be treated as though he has disturbed himself. However, would not this be equally the case were he to have been awarded compensation based on agricultural value ? He could realise that only by giving possession. Counsel for the appellants admitted that, had the agricultural value been awarded, the claimant would have been entitled to compensation for disturbance, but I am unable to see wherein the difference lies. The value of the land is what it will fetch. The arbitrator has to find its value apart from any question of disturbance, and the value is the same whether the purchaser is a builder, a philanthropist who desires to present the site to the town for a public park, or a local authority. Parliament might have provided that the value was to be what a willing purchaser would give if he intended to put the land to the same use as the vendor was putting it at the time of the notice to treat, but that is not what the rule says, and I see no warrant for reading it in that way. Then the Act says that the fact that the value of the land is to be taken to be the amount it would realise if sold in the open market by a willing seller is not to affect the assessment of compensation for disturbance, which appears to me plainly to contemplate that, if the owner can show that he has been put to expense or loss from being disturbed, he is to be compensated for that in addition to receiving the value of his land. If it were found in the arbitration that the owner had, at the time of the notice to treat, put his land into the market, or was intending to do so, so that, if the authority had not exercised their powers when they did, he would none the less have sold and left the property, I agree that no compensation for disturbance could be awarded. If the owner intended to disturb himself by selling, there is nothing for which to compensate him, but that is not found to be the case here. If he intended to remain, he is disturbed by being obliged to sell against his will, and I can see no reason why he should not be compensated under r. (6) on this account. Let me take as an illustration a case which might well arise.

The owner of a house standing in a park near a town hopes and intends to end his days there. The town increases in size, and perhaps extends its boundaries so as to embrace the property, and what was once a wholly rural situation becomes a part of an urban district. The owner, however, continues to reside on his property and wishes to remain there, it may be for reasons of sentiment, it may be because his age or health makes him disinclined to move, or he may have business interests in the town which render residence close by desirable. His income being sufficient for his needs, he is content to forgo the advantage of selling at the enhanced price which the extension of the town has caused. He has the property to leave to his descendants, who, incidentally, will have to pay death duties on the actual value, and not on what it would have fetched as a country residence. The local authority decides to acquire it. The owner will get the value of the land, presumably the same as his executors would have realised had he died and there had been no notice to treat, but he is put to heavy expense in moving and fitting up a new house. I cannot conceive that, in these circumstances, he may not have recourse to r. (6) and seek to be recouped for what it has cost him to get into his new house, nor can I see the justice of saying : " If you had sold half-a-dozen years ago, you would not have got as good a price." Nor do I see anything in the Act enabling the acquiring authority to say : " You ought not to be using your property as a dwelling-house or farm. Therefore, you should have nothing for being bought out against your will." Again, suppose that there are two adjoining sites, separately owned, on the outskirts of a town, both equally ripe for development. One is vacant and uncultivated, having been bought merely in the expectation that, as the town extends, the value will rise, and the site will thus prove a profitable investment. The other is occupied and highly cultivated as a market-garden. The market price of both as building land would presumably be the same, and, if compulsorily acquired, both owners would have to be treated as willing sellers. Surely the owner of the latter site could say that he was entitled under r. (6) to have compensation assessed for the disturbance to his business, for the loss of his cultivations and the like. If he cannot, then I do not see that any meaning or effect can be given to r. (6). On the other hand, the owner of the vacant site could not be heard to say that he wanted to hold on to his land for another four or five years in the hope of getting a still better price. He gets the market price at the time of the notice to quit, which must be taken to include any potential value for future improvement, and that is all he does get. As the judge pointed out, exactly the same argument could be used to exclude a claim for compensation for severance, which is a matter not directly based on the value of the land. The selling price of the land taken could, as he said, be obtained only by somebody willing to submit to the depreciation in value of the land not taken. For my part, I think that the reasoning of Atkinson, J., is quite unassailable, and that to hold the contrary would be to ignore entirely the provisions of r. (6). I think also that his opinion is supported by the judgment of the Court of Session in *Venables* v. *Department of Agriculture for Scotland* (3), which, I think, exactly coincides with that of the judge.

I ought perhaps to say a word with regard to *Mizen Bros.* v. *Mitcham Urban District Council* (1), especially as I think, from the language of the award, that the arbitrator based his finding on that decision. The case is not very helpful as an authority, because the Divisional Court delivered no reasoned judgment, but merely answered with a simple negative the questions propounded in the special case. We have been supplied with a shorthand note of the argument, and are asked to draw conclusions from the interlocutory observations of the members of the court during the argument. That case was complicated by certain agreements under which the owners, who were market gardeners, were allowed to retain possession for certain periods, apparently to obtain the benefit of the cultivation and also to remove their greenhouses. A claim for loss of business was raised, but the principal matter which seems to have been discussed was whether or not the owners could claim the cost of removing the greenhouses and fixtures. If the decision means that, where the value is assessed on the footing that the site is vacant, and, therefore, more valuable than if it is encumbered with buildings, the owners cannot have the higher value and the cost of clearing in addition, I should agree. If, however, it means that, where building value is given for farm or market-garden lands, no compensation for disturbance is to be awarded, I respectfully differ.

As I have already said, compensation for disturbance is one of the elements to be taken into account under the Lands Clauses Consolidation Act, 1845, in arriving at the total sum to be paid to the claimant, but, as far as I am aware, it has never been held that the right to have this element taken into account depends on the market value of the land, and, in my opinion, this is expressly recognised by the Act of 1919, because r. (6), in preserving the right to have compensation assessed for disturbance, refers to it in terms as a matter not directly based on the value of the land.

I think that, in remitting the case to the arbitrator, we should direct him to assess compensation for disturbance, taking into account all such matters as could be considered under the Lands Clauses Consolidation Act, 1845, under this head, which will include the expense of removal, loss of business and depreciation in stock, live and dead, but not the cost of removal of buildings. For my part, I would dismiss the appeal. As to the cross-appeal, I agree that it should be dismissed.

Appeal allowed and award remitted to arbitrator. Cross-appeal dismissed. Leave to appeal to the House of Lords.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *G. S. McIntire*, Town Clerk, Sunderland (for the appeallnts); *Maples, Teesdale & Co.*, agents for *Steel, Maitland & Byers*, Sunderland (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

COOPER *v.* JAX STORES, LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., MacKinnon and Goddard, L.JJ.), **March 21, 1941.**]

Emergency Legislation—Landlord and tenant—War damage—Notice of disclaimer—Notice to avoid disclaimer—Application by landlord for declaration that premises capable of beneficial occupation—No basis for application—Landlord and Tenant (*War Damage*) *Act,* 1939 (*c.* 72) *ss.* 6, 11 (1) (*c.*).

Premises were damaged by enemy action, and on Nov. 2, 1940, the tenants served a notice of disclaimer. On Nov. 25, the landlord served a notice to avoid disclaimer. On the same day, the landlord served notice of an application under the Landlord and Tenant (War Damage) Act, 1939, s. 11, for an order that the premises were capable of beneficial occupation and that the tenants were liable for the rent. At the hearing, the landlord contended that the whole of the premises was not unfit by reason of war damage at the date of the service of the notice of disclaimer, and that, under sect. 6 of the Act, the notice of disclaimer was of no effect :—

Held : if a landlord serves a notice to avoid disclaimer, he cannot afterwards apply for relief under sect. 6.]

[**EDITORIAL NOTE.** The importance of this case is that it settles the procedure under the 1939 Act. A landlord must now examine carefully the condition of the premises before he serves his notice to avoid disclaimer. From the date of the service of a notice of disclaimer he has one month in which he may do one of two things. On the one hand, if he is satisfied that the premises are not unfit for occupation by reason of war damage, he must apply under sect. 6 for a declaration to that effect. If he is satisfied that the premises are unfit and wishes the tenancy to continue, he will within one month serve a notice to avoid disclaimer. These two things are mutually exclusive and, therefore, the landlord must at once determine whether or not the premises are unfit by reason of war damage. It must be further stated, however, that, if he proceeds under sect. 6 and fails in his application, the court may, under sect. 6 (4) allow him to serve a notice to avoid disclaimer out of time; and, on the other hand, if he serves the notice to avoid disclaimer, under sect. 11 (1) (*c*) he may show that *part* of the premises is fit for occupation.

For the Landlord and Tenant (War Damage) Act, 1939, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 32, p. 984, *et seq.*

Appeal by the tenants from an order of His Honour Judge Ralph Thomas sitting at the Mayor's and City of London Court, dated Jan. 30, 1941. The facts are fully set out in the judgment of Sir Wilfrid Greene, M.R.

G. D. Squibb for the appellants.

Harry Lester for the respondent.

Squibb : It is not competent for the landlord to apply under sect. 6 if he has already served a notice to avoid disclaimer. Proceedings under sect. 6 imply a contention on the part of the landlord that the premises are not unfit, whereas serving a notice to avoid disclaimer is an admission by the landlord that the premises are unfit. To take proceedings under sect. 6 after serving a notice to avoid disclaimer is to approbate and to reprobate.

Lester : The application under sect. 6 is one to have it determined that the premises are not unfit. That matter is not included in sect. 11. If the premises were not in fact unfit at the time of the notice of disclaimer, that notice and other notices based on it are of no effect at all and the landlord can proceed under sect. 6 when he finds out the true position.

Sir Wilfrid Greene, M.R.: This appeal raises a point of some practical importance under the Landlord and Tenant (War Damage) Act, 1939. The premises in question were damaged twice. On Nov. 2, a notice of disclaimer was served, and on Nov. 29 a notice to avoid disclaimer was served by the landlord, who is the respondent to this appeal. On the same day, the landlord served notice of an application under sect. 11 of the Act for an order directing that:

> . . . the premises are capable of beneficial occupation and that rent shall be payable by the [tenants] in respect thereof.

It is to be observed that the application which may be made under sect. 11 (1) (*c*) relates to the case where part of the land is capable of beneficial occupation, and the jurisdiction of the court under that paragraph is a jurisdiction which only comes to it as the consequence of the landlord's action in serving a notice to avoid disclaimer. That power in the court is one of the modifications of the lease which are brought into effect by the mere service of a notice to avoid disclaimer. In making that application, therefore, the landlord was invoking the jurisdiction of the court, which it could have only on the footing that the landlord, by his own act, had taken a step which resulted in conferring that jurisdiction upon it.

When the case came on for hearing on Jan. 30, 1941, it appeared that the landlord's case was not that part of the land was capable of beneficial occupation, but was that the whole of it was so capable, and, in fact, that the land was not unfit by reason of war damage at the time when the notice of disclaimer was served. At the opening of the case, counsel for the landlord applied for leave to amend the notice of Nov. 29, 1940, and that leave was given. The so-called amendment was of this nature. The reference to sect. 11 was struck out and a reference to sect. 6 was substituted, and the relief asked for was that:

> . . . the notice of disclaimer is of no effect on the ground that the land comprised in the lease was not unfit by reason of war damage at the time when the notice of disclaimer was served.

In other words, under the guise of amendment the landlord was entirely abandoning his claim under sect. 11 to the relief appropriate under that section, and was setting up a totally different claim under a different section, the effect of which, if affirmed, would produce entirely different results. In fact, this was not an amendment at all. It was the abandonment of one claim and the substitution of another. Counsel for the tenant did not object to that so-called amendment, but he intimated that he would object that an application under sect. 6 was not competent in law. He did not take the point that the so-called amendment could not be permitted, and the application under it could not be entertained by the county court judge as a matter of jurisdiction, by reason of the time limit of one month imposed by sect. 6 on the application to determine the question whether the land was always not unfit.

In so far as the parties were able to do so, by consent they conferred upon the judge jurisdiction to decide, after the expiration of the month permitted, a question which, according to the language of the section, he could decide only within that month. I say that because, by allowing the amendment, as he called it, the judge could not ante-date the application which that amendment set on foot. The application, being an application made under sect. 6, could not be treated by the judge as an application made earlier than its date—namely, at the date of the hearing, which was after the expiration of the month. It could not be ante-dated so as to fall on the date of the original application under sect. 11. Accordingly, I say that the parties, by consent so far as it was open to them to do so, agreed to treat the application as having been made within the month. A question which at once leaps to the eye is whether or not the court, even with that consent, had jurisdiction to entertain an application under sect. 6 which was launched after the expiration of the statutory month. I do not propose to go into that question, beyond saying that I cannot, apart from general grounds, see how a consensual jurisdiction could be conferred in view of the language of subsect. (5), which contains a peremptory direction that the land shall be treated, for the purpose of any proceedings pursuant to the notice, as having been made unfit by reason of war damage at the time of the service of the notice of disclaimer unless the court decides on an application under the section—that is, an application within a month—that a notice of disclaimer is of no effect. If the parties consensually purport to give the court jurisdiction to entertain an application under sect. 6, after the expiration of the month, such an application being, it seems to me, a proceeding pursuant to the notice of disclaimer, the court is directed by that section to treat the land, for the purpose of those proceedings, as having been unfit, which, of course, leads to an absurd result. However, I do not express any concluded opinion upon that matter, because, when confronted with it, counsel for the respondent quite fairly said that in this court he was taken by surprise by the point, and was not in a position to argue it, since in the court below there was no objection to this so-called amendment. As I take the view that there are other grounds of substance which lead to the success of this appeal, I do not think it necessary to go further into that question.

The effect of serving the notice to avoid disclaimer is laid down in sect. 11, which provides as follows:

> The notice of disclaimer shall be of no effect.

In other words, immediately that piece of paper, the notice to avoid disclaimer, is served, another piece of paper, which had—at any rate, during its currency—a potential value and effect, becomes a piece of waste paper, with no legal effect and no potential legal effect. That being so, it seems to me that the landlord, having by his own action produced that result, from which other consequences flow, which I shall speak of in a moment, cannot thereafter change his attitude and say: "This notice of disclaimer was of no effect at all, owing to the fact that the premises were not unfit at the time when it was served." It seems to me that that would be approbating and reprobating, because it is to be observed that the very notice to avoid disclaimer, quite properly in the present case, informs the tenant that the landlord requires him to retain the lease on the terms specified under the Landlord and Tenant (War Damage) Act, 1939. It is only on the basis that the notice of disclaimer is a properly served document—that is to say, served in circumstances of unfitness—that that notice to avoid disclaimer can have any effect whatsoever, because the terms specified in the Act on which the tenant is to retain the lease involve modification of the contractual relationship between the parties. A covenant by the landlord with the tenants to render the premises fit is to be implied. The tenants are to be free from paying their rent until the land is rendered fit, and the court is given jurisdiction under para. (*c*), to which I have already referred, to grant a partial relief if part of the land is capable of beneficial occupation.

When the landlord served that document, which had not been avoided in any other way at that time, he altered by that very act the whole legal relationship of the parties. Any assignee of the tenants taking an assignment after that date would have taken it subject to the modifications of the lease for which sect. 11 provides. Having, therefore, done what the statute entitles him to do do, and having produced that legal consequence, he cannot afterwards turn round and say: "I am now going to attack the notice of disclaimer at its root. I am going to say under sect. 6 that it was a bad notice. There was no basis for it, because the land was never unfit, and, if I succeed on that the change in legal relationship which I have brought about under sect. 11 by my own act is going to be cancelled." It seems to me that landlords must make up their minds what their attitude is going to be, and the statute gives them time in which to do it. I cannot see that they should be allowed to inform tenants that they are going to treat with them upon one basis and then afterwards turn round and take up an attitude entirely inconsistent with that which they have previously taken up. Further, as the effect of serving the notice to avoid disclaimer is to make the notice of disclaimer of no effect—and that, I think, must mean of no effect *ab initio*—if it were possible for the court after such a service to entertain a subsequent application under sect. 6, I cannot myself see what subject-matter in the application would remain, because the notice, being of no effect, is a piece of waste paper. It is a nullity. If the landlord afterwards comes under sect. 6 and asks for a determination under that section, he is asking the court to determine on a document which is a nullity. It seems to me that that is another reason why the landlord's application under sect. 6, assuming it to have been validly set on foot in point of time, cannot be made, in view of the previous service of the notice to avoid disclaimer.

It is, I think, a confirmation of this view—if, indeed, confirmation be required, because I do not think that there is any real doubt about the matter—that sect. 6 (4) makes provision for the case where the landlord, A having attacked the notice of disclaimer on the ground that the land was not unfit, fails in his attack. In that case, the court is given power to allow him an extension of time in which to serve a notice to avoid disclaimer. The landlord, therefore, who is *bona fide* alleging that the premises are not unfit and the notice of disclaimer is bad, who makes an B application under sect. 6 instead of serving notice to avoid disclaimer under sect. 11 and who fails under sect. 6, will, in proper circumstances, be given an opportunity to serve a notice to avoid disclaimer notwithstanding that the statutory period of one month has elapsed. That is a perfectly reasonable and businesslike arrangement, and entirely protects C the *bona fide* landlord if he chooses to attack the notice under sect. 6 in the first instance. In my view, if, with those rights in front of him, the landlord chooses to take the step of serving a notice to avoid disclaimer, he cannot thereafter make an application under sect. 6 for the relief which that section provides. In the result, the appeal, which was an appeal D on a preliminary point of law only, must be allowed.

MacKinnon, L.J.: I agree. The only thing I want to add is this. It would be wrong to suppose that the amendment was merely to substitute a reference to sect. 6 instead of to sect. 11 in the notice of Nov. 29 and E the consequent relief asked for. It was really very much more than that. In truth it amounted, not only to this verbal alteration in the notice of Nov. 29, but also to granting the landlord permission to cancel the notice to avoid disclaimer, treating it as never having been given and wiping out all the legal consequences which, by virtue of the provision of the F statute, resulted from the service of that notice to avoid disclaimer. That, I think, is far beyond anything which it is possible, within the jurisdiction of the judge, to grant upon the landlord's application.

Goddard, L.J.: I agree. G

Appeal allowed with costs in both courts.

Solicitors: *Lucien Fior* (for the appellants); *James Brodie & Co.* (for the respondent). H

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

MICHEL HABIB RAJI AYOUB AND OTHERS *v.* SHEIKH SULEIMAN EL TAJI EL FAROUQI.

[PRIVY COUNCIL (Viscount Sankey, Lord Atkin and Luxmoore, L.J.), A **February 11, March 11, 1941.**]

Privy Council—Palestine—Damages—Breach of contract—Penalty or liquidated damages—Ottoman Code of Civil Procedure, arts. 111, 112*—Palestine Order in Council,* 1922, *s.* 46.

B On Nov. 12, 1929, the appellants and the respondent entered into a contract under which the respondent agreed to buy from the appellants a parcel of land in the sub-district of Jaffa. The agreement provided, *inter alia*, that the respondent should be let into possession on the payment of a deposit due on the signing of the agreement, that he should pay certain land taxes and tithes and the balance of the purchase price by certain stated instalments, and that he should pay to C the appellants: "£2,500 as agreed and liquidated damages without the necessity of notice if he commit a breach of all or part of his undertaking under the agreement." The agreement was subsequently varied by correspondence as to the date of the subsequent payments, with an express stipulation that the remaining stipulations of the agreement remained in force. In July, 1932, this action was commenced by the appellants to recover the agreed damages provided by the agree- D ment for breach. The breach complained of was the failure by the respondent to pay £400, part of the purchase price due in Feb., 1931, under the agreement as subsequently varied. The Ottoman Code of Civil Procedure, art. 111, provides that, where parties fix an amount as damages, no greater or less shall be awarded. The Palestine Order in Council, 1922, s. 46, provides that the jurisdiction of the civil courts E should be exercised in conformity with Ottoman law and subject thereto the English common law and doctrines of equity shall apply:—

HELD: (i) art. 111 requires that the parties shall have fixed an amount as "damages". "Damages" must here be taken to mean actual damages. The sum fixed by the contract bore no relation to any possible damage arising from the breach and was, therefore, not damages within F the meaning of the article, but a penalty and not recoverable by reason of the application of English principles.

(ii) art. 112 of the Ottoman Code of Civil Procedure providing for the payment of interest where damages are awarded for failure to pay a sum of money is not limited to cases where there is a single payment and applies to instalments. Arts. 111 and 112 are independent articles and it is not the case that, where art. 112 applies, art. 111 has no application.

G

[**EDITORIAL NOTE.** Where parties to a contract fix a sum to be recovered on a breach of its provisions or any of them, the sum must be a genuine pre-estimate of the damage likely to arise from the breach. In many cases the actual damage arising from the breach is very difficult to assess, and then any sum which is not clearly out of all proportion to the loss suffered is generally recoverable. In H the present case the damage suffered was a definite sum and only a small fraction of the sum stated in the contract to be recoverable, and there was no doubt that, in its nature, it was a penalty. The wording of the article, though definite, spoke only of damages and not of a penalty, and it is, therefore, held not to apply to a penalty.

AS TO PENALTY OR LIQUIDATED DAMAGES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 141—145, paras. 183-185; and FOR CASES, see DIGEST, Vol. 17, pp. 136-151, Nos. 422-535.]

Appeal by the plaintiffs from a judgment of the Supreme Court of Palestine sitting as a Court of Appeal, dated Oct. 25, 1937, setting aside a judgment of the District Court of Jaffa, dated June 17, 1937.

The facts are fully set out in the judgment of their Lordships, delivered by Lord Atkin.

Sir Thomas Strangman and *Phineas Quass* for the appellants.

The respondent did not appear and was not represented.

Lord Atkin: This is an appeal from the Supreme Court of Palestine, sitting as a Court of Appeal, who set aside a judgment of the District Court of Jaffa in favour of the appellants, the plaintiffs in the suit, for £2,500 for breach of contract. The hearing in the District Court was the result of a decision of this Board on appeal in the same case, who, after judgments in the two courts in Palestine ultimately in favour of the plaintiffs, remitted the case for a further and fuller hearing.

The dispute between the parties arises out of a contract in writing, dated Nov. 12, 1929, under which the appellants agreed to sell to the respondent certain land in the district of Jaffa. The purchase price was to be paid, as to £200, on the signing of the agreement, when the purchasers were to be let into possession, and the balance by instalments. There was a date fixed for completion and there were various stipulations by either party as to payment of taxes, survey of the land, proof of registration and the like. The agreement was subsequently varied by correspondence as to the date of the subsequent payments, with an express stipulation that the remaining stipulations of the agreement remained in force. The purchasers paid the initial £200 on signature and went into possession, but it does not appear that they have made any further payment. Clause 8 of the agreement provided as follows:

> The second party [the purchaser] shall pay to the first party £2,500 as agreed and liquidated damages without the necessity of notice if he commits a breach of all or part of his undertaking under this agreement.

There was a similar stipulation by the vendor in the event of any breach on his part. By the varied agreement, the purchaser was to pay £400 by the end of Feb., 1931. On Mar. 2, 1931, the vendors gave the purchasers written notice to pay the £400 within three days, and on July 25, 1932, delivered their statement of claim in the present action, which averred the contract, averred two breaches in respect of the non-payment of taxes and the non-payment of £400, and claimed £2,500 as the agreed damages. The District Court dismissed the action, on the ground that the claim as to damages did not apply to the contract as varied. This was obviously wrong, and in effect the Supreme Court so held, and, treating this as the only issue, gave judgment for the plaintiffs. On appeal to the Privy Council, this Board affirmed the opinion of the Supreme Court, so far as it went, but, as it was apparent that other points raised by the purchasers had not been disposed of, remitted the case for further hearing. In their judgment attention was called to the provisions of the Palestine Order in Council, 1922, s. 46, and to the introduction into the jurisprudence of Palestine of the provisions of the rules of the English common law and equity as there provided. It is plain that their Lordships studiously refrained from expressing any opinion as to the effect of this clause upon the issues in this action, and in this respect it would appear that one of the judges of the Supreme Court was under a misapprehension.

The questions which remained for consideration on the new trial, and have now been decided by the Supreme Court, arise out of the provisions of the Ottoman Code of Civil Procedure, arts. 111,112. Unfortunately, disputes have arisen in this and other cases as to the correct translation of this code, which is in Turkish. Fortunately, in the present case we have translations into Arabic by two of the judges of the Supreme Court who were members of the Appeal Court, and their Lordships are able to approach this part of the case with some confidence that the English translation of the Arabic by the court interpreter conveys the true text. There were some slight verbal differences in the Arabic translations which did not affect the substance, and, for the purpose of this decision, their Lordships adopt the rendering of the senior judge, Khaldi, J., which is as follows :

> 111. If it is pointed out and provided in the body of the contract that in the event of failure of any of the parties in the carrying out of what he undertook, he pays to the other party a fixed amount as damages, no greater or less should be awarded.
>
> 112. The damages to be awarded for failure to carry out the undertaking which amount to payment of money, is a judgment for the interest at the rate of 1 per cent. per month in respect of the capital amount. This interest is awarded without calling on the creditor to show that he suffered damage. If there is no agreement in the document (Sanad) regarding the interest and interest is claimed in respect of the debt in the notice, interest is calculated from the date of the notice. If there is no notice, interest is calculated from the date of the statement of claim.

It is necessary now to refer to the Palestine Order in Council, 1922, s. 46, which provides as follows :

> The jurisdiction of the civil courts shall be exercised in conformity with the Ottoman law in force in Palestine on Nov. 1, 1914, and such later Ottoman laws as have been or may be declared to be in force by public notice, and such orders in council, ordinances and regulations as are in force in Palestine at the date of the commencement of this order, or may hereafter be applied or enacted ; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before courts of justice and justices of the peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions. Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary.

The appellants contend that the case falls to be decided by the express provisions of art. 111 of the code, being Ottoman law in force at the material time. It is only subject thereto that the common law and doctrines of equity are directed to be in force, and there is, therefore, no support for the defendant's contention that the English distinction between penalty and liquidated damages has to be applied. That the stipulation as to £2,500 would be considered a penalty according to English rules was admitted by the appellants' counsel. There could A hardly be a plainer case. For any failure to pay any of the instalments on due date, for failure to pay taxes, to take the agreed part in the appointment of a surveyor, this sum of £2,500 became payable. It was the contention of counsel—and it seems correct—that the recovery of this sum left the instalments still outstanding, and that from time to B time the agreed sum would be recovered as and when there was any breach. Their Lordships cannot hold that, under the present system in Palestine, such harsh and oppressive terms have to be enforced by the courts. The terms of art. 111 can be readily construed so as to afford the courts the means of giving relief against a merely penal C stipulation. The code speaks in a legal system which does not know penalties as such; in which an agreement to pay damages must therefore be strictly enforced "no more and no less." However, when the difference between penalty and liquidated damages is introduced into the legal concepts which now, owing to sect. 46 of the order in council, form D the jurisprudence of Palestine, the terms of art. 111 can be given a plain and just meaning. Agreed liquidated damages; if to be enforced must be the result of a "genuine pre-estimate of damages," to use the illuminating phrase of Lord Dunedin. They do not include a sum fixed *in terrorem* covering breaches of contract of many varying degrees E of importance, the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. It seems right, therefore, to conclude that now, when the code is applied to contracts, "damages" will be taken to mean actual damages, and the article will apply only to an agreement which F represents "a genuine pre-estimate of damages." Where there is such an agreed sum, "no more and no less" can be awarded. However, if the court, applying well-known rules, has to conclude that the sum agreed was a penalty, whatever it may be called in the agreement, then the penal stipulation will not be enforced. It results from what has G been said that it appears more correct to say that the code must be construed in the light of the doctrines of English law, rather than that the English principles relieve against the code. If there is a clear and infrangible antimony the code must, of course, prevail. On this point therefore, the appeal fails.

H

It nevertheless remains to consider the construction of art. 112. The action has been remitted to the District Court to assess the damage caused to the appellants by the breaches alleged, and, unless the plaintiffs can claim interest under the article, it seems difficult to see what other damage they could establish. The view taken by the majority of the Supreme Court was apparently that the article applied only to a single obligation to pay money. It may be supposed that a simple money bond or a promissory note would be instances. It was not considered applicable to a contract where there were reciprocal undertakings. On this point, their Lordships agree with the acting Chief Justice that the words of the article do not appear to be as limited in this scope as appeared to the other two judges.

The promise to pay the purchase price in instalments is an "undertaking which amounts to the payment of money." A debt is constituted whether the price be for real or personal property, and whether it be due in one sum or in instalments, and it would appear irrelevant that there are other obligations outstanding on either side, if once it is established that a fixed sum is due and payable. It seems difficult to see why interest should be allowed on a single payment and not on instalments, or why, if in fact there has been a delay in making payment, the creditor should not be compensated because there are further and other obligations outstanding. At the hearing, it would appear that the respondent contended for the construction now adopted, arguing that art. 112 provided the only remedy for delay in payment, and that, where it applied, art. 111 had no operation. Their Lordships do not take this view. The two articles are independent, though, when it comes to assessing the actual damages, the appellants may have to fall back on art. 112. What the effect may be of a suit to recover interest only, and not the principal, is a matter which was not discussed at the hearing, and no opinion is expressed upon it. For the reasons above given, their Lordships will humbly advise His Majesty that this appeal be dismissed. As the respondent has not appeared, there will be no order respecting costs.

Appeal dismissed. No order as to costs.

Solicitors: *T. L. Wilson & Co.* (for the appellants).

[*Reported by* HUBERT B. FIGG, ESQ., *Barrister-at-Law.*]

CORBETT *v.* DUFF.
DALE *v.* DUFF.
FEEBERY *v.* ABBOTT.

[King's Bench Division (Lawrence, J.), **March 24, 25, 26, 1941.**]

Income Tax—Schedule E—Remuneration—Voluntary payments—Professional football players—Proceeds of benefit matches or payments in lieu thereof.

The taxpayers were professional football players and had received in one case the proceeds of a benefit match and in the other cases sums stated to be accrued shares of benefit. These payments were provided for by the regulations of the Football League and, though not obligatory, were expected, generally asked for, and generally accorded after continuous service for a certain number of years. The regulations stated that such payments were made for loyal and meritorious service :—

Held : these sums were paid as remuneration for the services of, and not as mere personal testimonials to, the players, and were rightly assessed to income tax.

[**EDITORIAL NOTE.** A distinction is drawn between sums paid as a personal testimonial and sums which are part of the remuneration. The distinction does not appear to be happy in the case of a professional player, because one who is personally popular with the crowd will in general receive a much larger sum than one not so popular, and it is difficult to argue that the payments here in question are not, in part, a personal testimonial. However, the fact that they are the subject of regulations by the league would seem definitely to impart to such payments the quality of remuneration rather than that of voluntary gifts.

As to Taxation of Voluntary Payments, see HALSBURY, Hailsham Edn., Vol. 17, pp. 213, 214, para. 435 ; and for Cases, see DIGEST, Vol. 28, pp. 85-87, Nos. 490-502.]

Cases referred to :

(1) *Seymour* v. *Reed*, [1927] A.C. 554 ; Digest Supp. ; 96 L.J.K.B. 839 ; 137 L.T. 312 ; 11 Tax Cas. 625 ; *revsg.*, [1927] 1 K.B. 90.

(2) *Blakiston* v. *Cooper*, [1909] A.C. 104 ; 28 Digest 86, *495* ; 78 L.J.K.B. 135 ; 100 L.T. 51 ; 5 Tax Cas. 347.

(3) *Davis* v. *Harrison* (1927), 96 L.J.K.B. 848 ; Digest Supp. ; 137 L.T. 324 ; 11 Tax Cas. 707.

Cases Stated by the Commissioners for the general purposes of the Income Tax Acts with reference to additional assessments upon three professional football players in respect of sums received by them as the proceeds of benefit matches, or in lieu of such proceeds.

The facts as to the payments are stated in the judgment. Professional footballers and the clubs which engage them are, in general, subject to the regulations of the Football League. Under reg. 61 of those regulations clubs may enter into an agreement with a player that he shall be entitled to the proceeds of a benefit match after a certain period of service and subject to certain conditions. Regulation 63 provides that, upon the transfer of a player from one club to another, the transferring club may, with the consent of the Football League, pay him a proportion of the sum he would receive for a benefit match and provides for the calculation of such proportion. This payment is stated in the regulation to be in lieu of presumed accrued share of benefit.

The Commissioners upheld the assessment and the taxpayers appealed.

Noel B. Goldie, K.C., and *R. W. Leach* for the appellants.

The Solicitor-General (*Rt. Hon. Sir William Jowett, K.C.*) and *Reginald P. Hills* for the respondents.

LAWRENCE, J.: In these three cases, the appellants are professional association football players, who have been assessed under Sched. E — and in one case under Sched. D — in respect of benefit payments made to them in the following circumstances by the clubs employing them. The appellant Feebery was employed by the Notts County Club in accordance with the regulations of the Football League, and, on Sept. 30, 1935, after playing for the Notts Club since 1929, he was granted an evening benefit match against the Heart of Midlothian Club. The match produced from the gate-money £266 5*s.*, and from the sale of tickets £20 10*s.*, which, after the deduction of entertainment tax, left £242 10*s.* 10*d.* The club made this sum up to £350, which was paid to Feebery with interest as follows: Aug. 14, 1936, £50; Sept. 26, 1936, £50; Oct. 3, 1936, £50, and Dec. 11, 1936, £200. The appellant Corbett was a member of the Manchester City Club, in accordance with the regulations of the Football League, and after playing for the club since 1931, on Aug. 4, 1936, he was transferred to the Lincoln City Football Club for £300. On transfer, an application was made to the Football League to pay Corbett £200 as an accrued share of benefit. The application was granted, and the sum of £200 was paid to him by the club on Aug. 25, 1936. The appellant Dale was employed in accordance with the regulations of the Football League by the Manchester City Club and, after playing for the club since 1931, on March 13, 1937, he was paid a sum of £650 as benefit, which is the subject of this appeal. He had previously received from the Manchester United Club in Dec., 1931, £500 on transfer to the Manchester City Club, and he received a further £100 from the Manchester City Club in Aug., 1938, shortly after his transfer to the Ipswich Town Football Club.

It is contended on behalf of the appellants that the sums in question were gifts, and were not made in pursuance of any formal agreement, such as is provided by reg. 61 of the Football League Regulations, and that they were analogous to the sum invested for the cricketer Seymour in *Seymour* v. *Reed* (1). The principle to be applied is stated by ROWLATT, J., and LORD CAVE in *Seymour* v. *Reed* (1), at pp. 559, 560, and by LORD LOREBURN in *Blakiston* v. *Cooper* (2), at p. 107—namely, that, if the payment, though voluntary, is remuneration for the office or employment, it is taxable, but, if it is personal in the sense that it is given to the person not as a holder of an office or employment, but as a personal testimonial, it is not.

It is obvious that the line is often difficult to draw. The clergyman who is personally admired and respected by his parishioners will probably receive larger Easter offerings than one who is not, and in this sense the gift is personal, but the occasion is annual, and is connected with the clergyman's office, and it was therefore held in *Blakiston* v. *Cooper* (2) to be in respect of the office, and not a personal testimonial. If the occasion of the gifts had been the clergyman's retirement, or his golden wedding, the decision would, I apprehend, have been the other way. A

In the present cases, it appears to me that all the payments in question were made in respect of, and as remuneration for, the appellants' employment and are taxable. As the special cases stated and the Football League Regulations indicate, the payments, though not obligatory, are expected, are generally asked for, and are usually accorded. They are B made after continuous service for a certain number of years, are stated in the regulations to be for loyal and meritorious service and, in special circumstances, to be in lieu of a presumed accrued share of benefits.

In my opinion, in face of the terms of regs. 61, 63 and the facts stated in the cases as to the understanding amongst professional football C players, it is impossible to hold that any of the three payments to the appellants in question was not paid in respect of, and as remuneration for, the appellants' employment as football players.

The only difference between the present case and *Davis* v. *Harrison* (3) is that in that case a formal agreement which had been entered into D under reg. 61 was not acted upon. A point was taken that in the cases of Corbett and Dale the Commissioners had held the payments to be wages, but there is nothing, in my opinion, in this point, as, whether they are wages or perquisites or other profits, they arise, in my opinion, from the employment, and are paid in respect of, and as remuneration for, the E employment, and are not mere personal testimonials. The appeals will, therefore, be dismissed with costs.

Appeals dismissed with costs.

Solicitors: *Turner, Osborn & Chatterton*, agents for *T. H. Hinchcliffe &* F *Son*, Manchester (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

GOULD *v.* McAULIFFE.

[KING'S BENCH DIVISION (Singleton, J.), **February 27, 1941.**]

Animals—Injuries by animals—Dog known to be dangerous—Trespasser—Customer of public-house acting reasonably.

The plaintiff went to the public-house to meet her husband, and, while waiting for him, had occasion to look for a lavatory. She did not inquire where she could find one, but went to a garden at the side of the public-house. Some years before, there had been a lavatory there and the plaintiff had used it, but it had since been removed. Not finding the lavatory, the plaintiff passed to the other side of the garden and through a gate which was open at the time. She had only proceeded a step or two beyond the gate when she was attacked and injured by a dog belonging to the licensee of the premises, the defendant. It was found as a fact (i) that there was an invitation to the plaintiff to enter the garden, but not to pass beyond it through the gate, (ii) that the plaintiff intended to be a customer of the public-house, and (iii) that the dog was one which the defendant knew had previously attacked at least two persons. The plaintiff based her claim on the negligent keeping of the dog, and the defendant contended that, in the place where she was attacked, the plaintiff was a trespasser; and also that her negligence had contributed to her accident:—

HELD: the defendant, having knowledge of the dog's propensities, did not exercise the degree of care necessary for the safety of customers acting reasonably and, though the invitation to the plaintiff did not extend beyond the garden to the yard, in passing through the gate the plaintiff was acting reasonably. The plaintiff was, therefore, entitled to recover.

[**EDITORIAL NOTE.** This is clearly a borderline case. Those arguing for the defendant have naturally stressed the fact that the plaintiff at the actual moment of attack was a trespasser. The judge, however, has based his decision on the duty of a person keeping a dangerous animal. It was at one time suggested that the keeping of a dangerous animal was unlawful in itself, but later authorities have made it clear that, while it is not unlawful to keep such an animal, to allow it an opportunity to harm anyone is unlawful. Such animals are kept at the peril of the owner, and, if they do harm, he will be responsible. This, however, is always subject to the exception that, if the injured person brings his injury on himself, the owner will escape that responsibility. In the present case it is found as a fact that the plaintiff acted reasonably and was not guilty of contributory negligence.

AS TO LIABILITY FOR INJURIES BY DANGEROUS ANIMALS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 543, 544, paras. 933, 934; and FOR CASES, see DIGEST, Vol. 2, pp. 238-241, Nos. 245-262.]

Cases referred to:

(1) *Mersey Docks and Harbour Board* v. *Procter*, [1923] A.C. 253; 36 Digest 15, *59*; 92 L.J.K.B. 479; 129 L.T. 34.

(2) *Liddle* v. *North Riding of Yorkshire County Council*, [1934] 2 K.B. 101; Digest Supp.; 103 L.J.K.B. 527; 151 L.T. 202.

(3) *Hardy* v. *Central London Ry. Co.*, [1920] 3 K.B. 459; 36 Digest 71, *457*; 89 L.J.K.B. 1187; 124 L.T. 136.

(4) *Addie (R.) & Sons (Collieries)* v. *Dumbreck*, [1929] A.C. 358; Digest Supp.; 98 L.J.P.C. 119; 140 L.T. 650.

(5) *May* v. *Burdett* (1846), 9 Q.B. 101; 36 Digest 118, *789*; 16 L.J.Q.B. 64; 7 L.T.O.S. 253.

(6) *Jackson* v. *Smithson* (1846), 15 M. & W. 563; 2 Digest 243, *273*; 15 L.J.Ex. 311; 7 L.T.O.S. 231.

(7) *Card* v. *Case* (1848), 5 C.B. 622; 2 Digest 242, *267*; 17 L.J.C.P. 124; 10 L.T.O.S. 416.

(8) *Knott* v. *London County Council,* [1934] 1 K.B. 126; Digest Supp.; 103 L.J.K.B. 100; 150 L.T. 91.

(9) *Lowery* v. *Walker,* [1911] A.C. 10; 2 Digest 241, *261*; 80 L.J.K.B. 138; 103 L.T. 674.

ACTION for damages for personal injuries caused by the alleged negligence of the defendant. The facts are fully set out in the judgment.

J. Davidson for the plaintiff.

Alban Gordon for the defendant.

SINGLETON, J.: The plaintiff is a married woman, 48 years of age. On June 14, 1940, she had arranged to meet her husband in the course of the morning at a public-house at Earlsfield known as Ye Olde Leather Bottle, of which the defendant is the licensee and occupier. She ought to have met her husband about 11 a.m., but, when she arrived there, he had not arrived, and she waited outside for some little time. She had been to that public-house before, but not for some three or four years. After the plaintiff had waited some time for her husband, she wanted to go to the lavatory, and went to that part of the public-house which she really knew best. Instead of going inside, she went down a long entry on the south side where there is a large garden and a bowling-green. Along that entry there are two notices. One is "To the English Garden and Bowling Green," and the other is, "To the Garden," with a hand indicating the direction of the garden. When the plaintiff was there last, there was a ladies lavatory by a fish-pond in the garden, but that was removed some few years ago. The plaintiff preferred to go on, rather than go into the public-house and ask someone there where the lavatory was. She saw in front of her a small wooden fence about 3ft. 9ins. high with a gate in the middle of it, which was partly open. She pushed it further open and went through, thinking that just a few yards further on was the lavatory which she was seeking. In doing that, I do not think that she was acting in any way imprudently. It was daylight, and she could see what was in front of her. She thought that there would be a lavatory outside, where the public-house adjoined this large garden and bowling-green, and she saw two doors opposite, one of which she might well have thought was a ladies lavatory. When she had taken two steps beyond the gate, a dog appeared on the right side and attacked her, causing her severe injuries.

The defendant was in the lounge when the plaintiff passed by the end of the hotel, and he saw her going in the direction of the garden. He said something to his wife which caused her to go out through the back of the hotel yard where this dog was. She arrived in the yard at about the time when the dog had seized the plaintiff. Apparently, she called the dog away. The plaintiff then took two steps backwards through the gate, closing the gate after her. Upon those facts, the plaintiff contends that the defendant had invited her, as he invited other customers, to go to his public-house. The use of the public-house covers, it is agreed, the use of the garden and the bowling-green. The defendant, by his counsel, contends that that invitation ceased at the fence or the gate between the garden and the yard. The defendant said: " The public part is the public-house itself—that is, the licensed premises, including the garden and the bowling-green—but no one has any invitation to go through the fence between the garden and the yard, and no one is permitted or allowed by me to do so." In other words, nobody is likely to do so. Thus, if a person passes through the gate, then, whether the gate be closed or open, that person is not an invitee or a licensee. He is a trespasser. Indeed, the defendant added: " The yard where the plaintiff was when she was bitten is a private part, private to me. I have my stores and various places there. There is no entry from the road, and there I have a notice marked " Private." It is not a place for the customers of the hotel to resort to at all, and there is no reason why anyone should go through that gate from the garden to the yard."

Counsel for the plaintiff submitted that it was reasonable for anyone in the position of the plaintiff, who was to be regarded as an invitee when she was in the garden, to think that the invitation extended through the gate and into the yard. Indeed, he added that she might well have thought that there was a lavatory there, as there usually is an outside lavatory where there are large outside premises. She might well think that she was approaching one. It was daylight, and there was no reason why she could not go and look for one, and, though it cannot be said that there was an express invitation to use that part of the premises, the construction of the premises, and the fact that the gate was open at the time, constitute an invitation to the plaintiff to use the part of the premises in which she was when she was bitten.

In the course of the argument, a number of cases were referred to in which actions had been brought by persons who had fallen down steps in a public-house or who had fallen down lift shafts as they were wandering along in the dark. The circumstances here are quite different. It was broad daylight. The plaintiff was anxious to find a lavatory. She was not taking any risk of which she was conscious at all, but it so happened that the defendant's dog was in the yard.

It was proved to my satisfaction by a witness who had been employed at a garage near the premises that the dog had twice attacked him some considerable time ago, and, on the first of those occasions, he complained to the landlord. The defendant said that he could not remember that. He was asked in cross-examination if anyone else had complained. He said: " Yes. The police sergeant complained on one occasion that the dog had torn his overcoat, and I thought I might have to pay for it." I formed the view that the defendant's wife knew that this dog was not very good-tempered. Thus, in the yard the defendant kept a dog which he knew to be of a dangerous propensity, and which he knew might attack someone. The fact was brought to his knowledge long before the plaintiff was attacked by the dog. There was no notice of any kind upon the gate warning people that beyond the gate the ground was private, or that there was a dangerous dog in the yard. The argument of counsel for the defendant is that, notwithstanding those circumstances, the plaintiff is not entitled to recover, because, at the time when she was bitten, she was a trespasser. It was submitted that she had gone at least two steps beyond that place to which the invitation extended, and that, from the moment she passed through the gate, she was a trespasser. Counsel for the defendant did say at one time that, if a person could reasonably think that there was an invitation—that is, if the plaintiff could reasonably think that the invitation to her as a prospective customer of the hotel extended to the yard — there would be liability. I am not sure that that would not take it a little further than counsel for the plaintiff needed to go, but I am satisfied myself that the plaintiff might reasonably think that the invitation extended to the yard, and that she was not in any way doing that which a reasonable person would not do in stepping through an open gate to go towards a door which she could see to look for the lavatory. If the question depended upon whether or not she might reasonably think the invitation extended to that, I think that it would be comparatively easy, but, as I have said, I am not sure that that really is the test in this case. To one particular part the customers of the hotel were in fact invited, and, if there can be said to be anything in the nature of invitation to the private yard, it can only be an implied invitation arising through the nature of the premises. There is nothing in this case which shows user by other persons with the consent of the occupier, as was proved in some of the cases cited in argument.

On this question of licensee or trespasser, I was referred to a number of authorities, and in particular to some words of Lord Cave, L.C., in *Mersey Docks & Harbour Board* v. *Procter* (1), and also to the judgment of the Court of Appeal in *Liddle* v. *North Riding Yorkshire County Council* (2). The latter case was one where a child received injury. Scrutton, L.J., in that particular case, referred to two American cases at p. 110, and then said, at pp. 111, 112 :

> In *Hardy* v. *Central London Ry. Co.* (3) this court dismissed the claim of a child of 5 who, being taken, not for the purpose of travelling, by an older boy into a station where there was an escalator, from which children were driven away whenever they were seen, caught his fingers in the band of the escalator. He was treated by the court as a trespasser. In that case I stated the position of a child trespasser thus : I am reading from *Addie's* case (4) where Lord Hailsham [at p. 367] cites what I said: " If the children were trespassers, the landowner was not entitled intentionally to injure them, or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers." Lord Hailsham, in the House of Lords, said [p. 367] : " My Lords, I believe that that sentence accurately summarises the English law."

Counsel for the defendant, relying upon that, said that in the present case the plaintiff was a trespasser in fact, and the defendant was under no liability. He submitted, further, that the defendant was entitled to keep a savage animal, or to keep a dog which he knew to be of a malicious propensity. As regards trespassers, the landowner is not entitled to put dangerous traps intended to injure them, but he is under no liability if, in trespassing, they injure themselves.

I confess that I find this case difficult to decide upon this point. I have said that I think that the invitation which was given by the landlord, or which was intended to be given by the landlord, ended at the gate in the fence, but in fact the nature of the premises was such that anyone might well think that the invitation extended further, and the plaintiff did so. I prefer to deal with this case on another ground. It cannot be said that the defendant placed anything on the premises with the intention of injuring the plaintiff. At the same time, in the yard, separated from the garden only by this low fence, with a gate which was open, he did have a savage dog. What is the duty of a man who keeps a dog of that kind? The law is stated in SALMOND ON TORTS, 9th Edn., p. 554:

> He who keeps a dangerous animal keeps it at his peril. Every man is bound, at his peril, to prevent such animals from going at large or from obtaining in any other manner an opportunity of exercising their mischievous propensities. If any harm is done by them he is liable, without any allegation or proof of negligence, unless there exists some specific ground of exemption. This rule of absolute liability was established in the year 1846 by the Court of Queen's Bench in *May* v. *Burdett* (5), a decision which was followed in the same year by the Court of Exchequer in *Jackson* v. *Smithson* (6), and two years later by the Court of Common Pleas in *Card* v. *Case* (7). In the first of these cases the plaintiff had been bitten by a monkey kept by the defendant upon his premises, and in answer to the contention of the defendant that he was not liable save for want of due care in taking precautions against mischief, it is said by LORD DENMAN, C.J. [p. 103]: "The gist of the action is the *keeping* of the animal after *knowledge* of its mischievous propensities. . . . But the conclusion to be drawn from an examination of all the authorities appears to us to be this: that a person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure *at his peril*; and that, if it does mischief, negligence is presumed without express averment. . . . The negligence is in keeping such an animal after notice." Although the rule is undoubted, the reason given for it in some of the cases by which it was established—namely, that the very act of keeping a dangerous animal is itself wrongful, and therefore a ground of liability for damage enures—can no longer be accepted as sound. Even in the case of wild beasts, there is nothing illegal in the possession of them. The keeping of a wild beast show is a perfectly lawful business, no less than the keeping of cattle, yet tigers and cows will both do mischief after the custom of their kind if they are allowed the opportunity. The keeping of a dangerous animal is to be classed not as a wrongful act, but as one of those rightful acts, which, notwithstanding their rightfulness are yet the ground of legal liability if harm enures therefrom, even by way of inevitable accident. "No doubt," says PLATT, B., in *Jackson* v. *Smithson* (6) [p. 565] "a man has a right to keep an animal which is *ferae naturae*, and nobody has a right to interfere with him in doing so until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible." And again, LORD WRIGHT has recently said [in *Knott* v. *London County Council* (8) at p. 138]: " . . . it is not unlawful or wrongful to keep such an animal; the wrong is in allowing it to escape from the keeper's control with the result that it does damage."

Counsel for the defendant submitted that the reason given by LORD DENMAN, L.C.J., in *May* v. *Burdett*, (5) which I have just read—and, indeed, the reasoning of PLATT, B., in *Jackson* v. *Smithson* (6)—went a little too far, and that both decisions must be considered in view of the decision of the Court of Appeal, which was reversed for other reasons by the House of Lords, in *Lowery* v. *Walker* (9). The headnote in that case is as follows:

> The respondent, who owned a savage horse which he knew to be dangerous to mankind, put it, without giving any warning, into a field of which he was the occupier and which he knew the public were in the habit of crossing without leave on their way to a railway station. The appellant in crossing the field was attacked, bitten, and stamped on by the horse. The county court judge found as a fact that the respondent was guilty of negligence in putting a horse which he knew to be ferocious into a field which he knew to be habitually crossed by the public and gave judgment for the appellant and £100 damages :
>
> Held that, the effect of the learned judge's finding being that the appellant was in the field without the express leave but with the permission of the respondent, the appellant was entitled to recover.
>
> *Decision of the Divisional Court* ([1909] 2 K.B. 433) *and decision of the Court of Appeal* ([1910] 1 K.B. 173) *reversed.*

The House of Lords found that it had been found by the county court judge that the plaintiff was there in circumstances in which it was known by the occupier that that field was habitually crossed by the public. The Earl of Halsbury said in that case, at pp. 12, 13 :

> The learned judge used an ambiguous word. I suppose nine out of ten people would distinguish between a person who was at a place as of right and a person who was a mere trespasser. The learned judge did, I think inadvertently, in the first instance use the word " trespassor," which would have carried the learned counsel for the respondent all the way he wants to get to a somewhat difficult and intricate question of law upon which various views may be entertained.

In other words, the House of Lords would have assumed (as the Court of Appeal and the Divisional Court held) that, if the plaintiff was a trespasser, he could not have recovered.

I have dealt already with the position of the plaintiff at the time when she passed through the gate. I am not at all sure that Lord Halsbury was not a little optimistic when he said, at p. 12 :

> I suppose nine out of ten people would distinguish between a person who was at a place as of right and a person who was a mere trespasser.

It is not easy to decide every time. It is not easy in the circumstances of this case. However, the plaintiff's claim also embraces an allegation in para. 4 that the injury, loss and damage were caused by negligence and/or breach of duty. The defendant has denied that in his defence. Para. 5 of the defence pleads as follows :

> That if (which is not admitted) the plaintiff suffered the alleged or any loss or damage she did so by reason of her aforesaid trespass and by reason of her negligence in that she passed through a private gate and entered upon the defendant's private yard without care for her own safety, and without first ascertaining whether there might be (as in fact there was) a dog loose in the said yard.

I have mentioned already the question of trespass, and I have said that, in my opinion, the plaintiff might well think that she was going to a place to which she was invited. I do not think that she was guilty of any negligence whatever. It was not want of due care upon her part to go through that gate and to enter the yard. She was not bound to look and see whether or not there was a dangerous dog in the yard.

I will now deal with the defendant's position. It is clear that the defendant ought not to be found guilty of negligence unless there is some duty owed by him and some breach of duty or failure to do that which a reasonable man would do towards complying with the duty which he owed. In my view, a licensee of a public-house who has a dangerous dog ought to take steps to see that that dangerous dog is kept away from customers of his inn behaving reasonably. The defendant kept the dog in the yard. On the morning in question, the gate between the yard and the garden was open. That was not reasonable care on the part of the defendant, who had knowledge of this dog's propensities. As I have said, there was no negligence on the part of the plaintiff. I think that a licensee and occupier of a public-house who keeps a dog which he knows to be dangerous ought to keep it away from the customers of the house, and he ought to see that it is so secure that it cannot attack someone who is on his premises or who mistakenly steps one or two yards through an open gate.

The circumstances here are by no means the same as they were in *Lowery* v. *Walker* (9). There is no evidence before me to show that the defendant knew that people knew of his dog. On the other hand, the circumstances were such that any reasonable man occupying those premises as licensee would know that someone might easily wander from the garden through the gate. I cannot help thinking that the defendant and his wife both did realise that, and that that is why they told me that they went to see, or did see, that the gate was shut at 11 a.m. on that day. The gate was not shut at 11.30 a.m. on that day when the plaintiff wandered through it.

The circumstances are these. The defendant had a dangerous dog, and he did not take care to see that it was kept away from people who were using the premises without negligence. I think that in that way he failed in his duty. He did owe a duty to this plaintiff, who, although on that occasion she had not yet been supplied with refreshment at the house, had gone there for the purpose of being supplied, and had walked round into the garden, as she was entitled to do. When she was two paces beyond the garden gate, she was attacked by a dog, the nature of which the defendant knew. I think that that is a risk to which she ought not to have been subjected, and, in my view, the defendant was in that respect guilty of negligence. He had a dangerous dog, and he not only failed to keep it secure, but he left it in a yard the gate of which was open and in such a place that anyone using the garden might quite easily step through it into the yard. I think that the defendant failed in his duty and was negligent in that sense, and that the plaintiff is entitled to damages.

Judgment for the plaintiff for £150 *and costs.*

Solicitors: *D. A. Terry & Co.* (for the plaintiff); *Oswald Hanson & Smith* (for the defendant).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

CHADWICK *v.* PIONEER PRIVATE TELEPHONE CO., LTD.

[Manchester Winter Assizes (Stable, J.), **March 12, 1941.**]

Work and Labour—National health insurance—Failure to insure—Breach of statutory duty—Whether actionable at common law—National Health Insurance Act, 1936 (c. 32), *ss.* 1, 174 (1).

A traveller was employed on the basis of payment of his expenses and commission on orders obtained. His employers failed to insure him under the National Health Insurance Act, 1936. If they had done so and assuming he was an insurable person under the Act, his widow would have been entitled to a pension under the Widows', Orphans' and Old Age Contributory Pensions Act, 1936. Alleging that the failure of the employers to insure her husband had led to the loss of her pension, the widow brought an action for damages for breach of the statutory duty to insure. The National Health Insurance Act, 1936, s. 174, gives an employee or any person claiming through him a right to recover in civil proceedings an amount equal to any sickness, disablement or maternity benefit which he has lost :—

Held : as the widow's claim was not within sect. 174 of the Act, the remedy in respect of the unpaid contributions was restricted to the criminal proceedings provided by the Act, and, in the circumstances, there was no cause of action for breach of statutory duty.

[**EDITORIAL NOTE.** It is purely a matter of construction whether both criminal and civil proceedings will lie for a breach of statutory duty, and, where the Act provides for a civil remedy in certain cases, it is *prima facie* to be assumed that the intention of the legislature is to exclude such remedy in other cases. It will be noted that it seems to be thought, though not decided, that the question of the insurability of the deceased might have to be determined by the special procedure of an application to the Minister, followed, if the party be so advised, by an appeal to the judge nominated to deal with such matters.

As to Employer's Civil Liability, see HALSBURY, Hailsham Edn., Vol. 34, p. 717, para. 963 ; and for Cases, see DIGEST, Vol. 44, pp. 1314, 1315, Nos. 173-176.]

Action for damages for breach of statutory duty in that the defendants failed to pay the contributions due under the National Health Insurance Act, 1936, in respect of the employment of the plaintiff's husband. The facts are fully set out in the judgment. The National Health Insurance Act, 1936, s. 174 (1), provides as follows :

> (1) Where an employer has failed or neglected to pay any contribution which under this Act he is liable to pay in respect of any insured person in his employment (in this section referred to as " an employee "), or has failed or neglected to comply in relation to any employee with the requirements of any such regulations relating to the payment and collection of contributions, and by reason thereof the employee or any person claiming through the employee has lost in whole or in part any benefits to which he would have been entitled under this Act, the employee or person so claiming shall be entitled to recover summarily from the employer as a civil debt a sum equal to the amount of any sickness, disablement or maternity benefit which he has lost as aforesaid, and a sum equal to the amount of any expenses which he has incurred by reason of not being entitled to medical benefit.

N. J. Laski, K.C., and *P. M. Oliver* for the plaintiff.
Henry Burton for the defendants.

Stable, J. : In substance, this claim by Mrs. Chadwick is a claim

against the defendant company on the basis that, although her husband was employed by them under a contract of service which rendered it obligatory on them to insure him under the National Health Insurance Act, 1936, that statutory duty or obligation was neglected, with the result
A that Mrs. Chadwick is not now in receipt of the pension, consequent on her husband's death, which she would have been entitled to receive if her husband had been an insurable person, and had in fact been insured.

Counsel for the plaintiff has called my attention to the provisions of the Acts of Parliament, and I think that it is sufficient to say that the Widows',
B Orphans' and Old Age Contributory Pensions Act, 1936, provides that the widow of an insured man shall receive a pension at the rate of 10*s.* per week. An insured person means a person insured under the National Health Insurance Act, 1936. The National Health Insurance Act, 1936, imposes an obligation on persons falling within certain categories
C to be insured, and, in the case of non-manual workers, the statutory limit of income is £250 per annum. It is conceded in this case that Chadwick's remuneration from the company fell below the figure of £250 per annum.

The first question I have to decide is whether the deceased was an
D insurable person. On the evidence, I hold that he was not. The definition of "employment" in Sched. I is really governed by the words "under any contract of service." There never was a subsisting contract of service between Chadwick and the defendant company. A contract of service implies an obligation to serve, and it
E comprises some degree of control by the master. In this case, I do not think that there was any degree of control at all. It paid the defendant company to make him an allowance for travelling expenses and to pay him a commission on the orders he obtained. The relationship between them, so far as it was contractual, was not a contract of service, and, that
F being so, the case breaks down on the question of fact. I would only add this. I am by no means certain that it is open to me to determine whether Chadwick was an insurable person within the meaning of these Acts. The National Health Insurance Act, 1936, s. 161, provides that the question whether or not any employee is an employee within the
G meaning of the Act is a question which must be determined by the Minister, and by no one else, and there is a proviso that any person aggrieved by the determination of the Minister may appeal to a nominated judge on any question of law. The decision of the judge is the final decision.

H I need not decide that point in this case, but, in my view, the question whether any particular person is insurable does not depend on whether the judge before whom the action is tried takes a particular view of the evidence in relation to the Act of Parliament. The question can only be decided by the Minister, subject to the restricted right of appeal which the Act provides. If that view is right, then Mrs. Chadwick would have to satisfy the court who tried this action, or a similar action, that the

Minister had determined, in accordance with the provisions of the Act of Parliament, that her husband was an insurable person. She cannot do that in this case because the Minister has not determined that point. If it is a matter for me to decide, I hold that Chadwick never was an insurable person at all.

Even if I am wrong on that point, and there has been a breach of this statutory duty on the part of the defendants, in my view, Mrs. Chadwick has no cause of action against the defendants. The National Health Insurance Act, 1936, provides for criminal proceedings against employers who fail to discharge the duty which is imposed upon them, in the first instance, of paying the contributions. Under sect. 174, there is a cause of action created in favour of employees and persons claiming through them, but, in my judgment, that statutory right of action is restricted to the express terms of the section, and any claim which falls outside those terms cannot be made the subject of a civil action. My attention has been directed to the Widows', Orphans' and Old Age Contributory Pensions Act, 1936, and more particularly to sect. 13. It is quite clear that within the two Acts of Parliament the right of action which is sought to be enforced in this case cannot be found, and, in my judgment, the case is one which falls into that category of cases in which there is no common law right of action on the part of a widow. Her remedies, if any, are confined to those created by the Acts of Parliament. The result is that this action fails, and must be dismissed. The defendants did not ask for costs.

Action dismissed. No order as to costs.

Solicitors: *Vaudrey, Osborne & Mellor* (for the plaintiff); *Dunderdale, Wignall & Co.* (for the respondents).

[*Reported by* M. D. Chorlton, *Barrister-at-Law.*]

HASELDINE *v.* C. A. DAW & SON, LTD., AND OTHERS.

[KING'S BENCH DIVISION (Hilbery, J.), **March 18, 19, 20, 21, 24, 25, 26, 1941.**]

Landlord and tenant—Flats—Lift—Liability of Landlord for proper repair of lift—Liability to visitor of tenants of flat.

Negligence—Dangerous article—Liability of repairer—Lift—Limited contract of maintenance—Liability to user of lift.

The plaintiff was injured in an accident caused by the breaking of the cylinder gland of a hydraulic lift in a block of flats. The flats were owned by D. and the parts not in the actual occupation of the tenants were in the occupation of D. The actual management of the flats had been vested in a limited company, D. & Son, Ltd., of which D. was the principal director and secretary. The maintenance of the lift was provided for by a contract with a firm of lift engineers, S., Ltd., but by their contract they only undertook to make a regular monthly visit for inspection, adjustment and lubrication, including the repacking of the cylinder glands and the re-leathering of the control valve. The replacement or renewal of worn parts was excluded. The lift had been in use for some 35 years and its maintenance, subject to restrictions of the above contract, had been attended to by S., Ltd. An assistant of S., Ltd. had attended on the day before the accident and repacked the gland, the breaking of which was found to be the cause of the accident. D. & Son, Ltd. had effected an insurance against third-party risks arising out of the working of the lift and the engineers of the insurance company had inspected the lift about 2 months before the accident and had reported that it was generally in good working order. It was found as a fact that D. had delegated the safe working of the lift to D. & Son, Ltd. as his agents, that the accident was not due to improper working by the porter in attendance, but to insufficient arrangements for overhaul and replacement of worn parts, and that the actual cause of the accident was the failure of S., Ltd., to repack the gland with reasonable care and skill :—

HELD : (i) since D. had delegated the care and attention of the lift to D. & Son, Ltd., only as his agents, he was the person liable in law for any negligence in the upkeep of the lift.

(ii) the plaintiff being merely a licensee, D. only owed him a duty to warn him of any danger of which D. was actually aware, and, on the facts, it was not brought to D.'s mind that he was exposing persons using the lift to actual danger. The plaintiff, therefore, could not succeed against D. as the occupier of the premises.

(iii) D. undertook the carriage of the plaintiff in the lift, and, although he did so gratuitously, he was bound to provide a lift reasonably safe for such carriage, and he could not rely upon the fact that he had employed experts to maintain the lift, as he had contracted for only a limited amount of maintenance, and had retained the right to determine what repairs and renewals should be done. Therefore, he was liable in damages to the plaintiff.

(iv) the cause of the accident being the faulty repacking of the gland by S., Ltd., they were liable in tort to the plaintiff, since they ought to have known that that failure would result in danger to persons using the lift, and that no opportunity for intermediate examination could reasonably be expected to occur between the doing of the work and the user of the lift.

(v) in the circumstances, D. & Son, Ltd. were under no liability to the plaintiff.

[**EDITORIAL NOTE.** The chief interest in this judgment was in the application of the law relating to horizontal carriage to the case of vertical carriage. The position with regard to the carriage of passengers by railway or in road vehicles is well settled and it is here applied to carriage in a lift. Perhaps the position as to gratuitous carriage may not be thought to be so clear upon the authorities, and its application in all its strictness to the case of a landlord of flats who provides a lift for the use of visitors may appear a little harsh. The other point of interest is the application of the doctrine laid down in *M'Alister* (*or Donoghue*) v. *Stevenson* (12) to the case of a repairer under a limited contract of maintenance. Thus the landlord of flats who would have been secure from liability in the case of a staircase under *Fairman* v. *Perpetual Investment Building Socy.* (2) finds himself liable in a case where, for the greater convenience of his tenants, he has installed a lift, and contractors, who used to plead with confidence that they were under no liability to a stranger to their contract, now find themselves liable in tort to many persons for the inefficient work of their employees.

As to Liability of Landlord of Flats, see HALSBURY, Hailsham Edn., Vol. 20, pp. 337-339, paras. 405, 406; and for Cases, see Digest Vol. 31, p. 102, Nos. 2394- 2397.]

Cases referred to:

(1) *Addie* (*R.*) *& Sons* (*Collieries*) v. *Dumbreck*, [1929] A.C. 358; Digest Supp.; 98 L.J.P.C. 119; 140 L.T. 650.

(2) *Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74; 36 Digest 37, *213*; 92 L.J.K.B. 50; 128 L.T. 386.

(3) *Ellis* v. *Fulham Borough Council*, [1938] 1 K.B. 212; [1937] 3 All E.R. 454; Digest Supp.; 107 L.J.K.B. 84; 157 L.T. 380.

(4) *Harris* v. *Perry & Co.*, [1903] 2 K.B. 219; 8 Digest 11, *44*; 72 L.J.K.B. 725; 89 L.T. 174.

(5) *Southcote's Case* (1601), 4 Co. Rep. 83b; 8 Digest 19, *96*.

(6) *Coggs* v. *Bernard* (1703), 2 Ld. Raym. 909; 8 Digest 18, *85*.

(7) *Lygo* v. *Newbold* (1854), 9 Exch. 302; 36 Digest 49, *307*; 23 L.J.Ex. 108; 22 L.T.O.S. 226.

(8) *Austin* v. *Great Western Ry. Co.* (1867), L.R. 2 Q.B. 442; 8 Digest 95, *638*; 36 L.J.Q.B. 201; 16 L.T. 320.

(9) *Marshall* v. *York, Newcastle & Berwick Ry. Co.* (1851), 11 C.B. 655; 8 Digest 121, *811*; 21 L.J.C.P. 34; 18 L.T.O.S. 94.

(10) *Christie* v. *Griggs* (1809), 2 Camp. 79; 8 Digest 75, *515*.

(11) *Earl* v. *Lubbock*, [1905] 1 K.B. 253; 36 Digest 63, *408*; 74 L.J.K.B. 121; 91 L.T. 830.

(12) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.C.P. 119; 147 L.T. 281.

(13) *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85; Digest Supp.; 105 L.J.P.C. 6; 154 L.T. 18.

(14) *Stennett* v. *Hancock & Peters*, [1939] 2 All E. R.578; Digest Supp.

(15) *Herschthal* v. *Stewart & Ardern, Ltd.*, [1940] 1 K.B. 155; [1939] 4 All E.R. 123; Digest Supp.; 161 L.T. 331.

(16) *Malfroot* v. *Noxal, Ltd.*, (1935), 51 T.L.R. 551; Digest Supp.

(17) *Buckner* v. *Ashby & Horner, Ltd.* (1940), 57 T.L.R. 238; Digest Supp.

Action for damages for personal injuries caused by the alleged negligence of the defendants. The facts are fully set out in the judgment.

H. J. Wallington, K.C., and *H. G. Robertson* for the plaintiff.

H. D. Samuels, K.C., and *F. W. Beney* for the first and third defendants.

F. A. Sellers, K.C., and *Montague L. Berryman* for the second defendant.

Hilbery, J.: The plaintiff, the managing clerk to a firm of solicitors, in the course of his professional affairs went to Hornton Court, Kensington

—a block of flats owned by the defendant Daw and managed by the defendants C. A. Daw & Son, Ltd.—in order to call upon a tenant living there. On arrival at the flats, he inquired of the porter upon which floor the flat of the tenant on whom he had to call was. He was told by the porter that it was upon the fifth floor, and the porter, who was then standing by the lift (the door of which was open) stood aside and motioned him to enter the lift. The porter came into the lift, closed the gates, and set the lift in motion. It was a hydraulic lift, and, when it had reached about the second floor, it failed, stopped, and then began to fall to the bottom of the lift well. In spite of the efforts of the porter to check its descent, it rapidly dropped to the bottom, where it jarred upon the base and stops and came to a standstill. The result was that the plaintiff sustained a severe injury, a compressed fracture of the third lumbar vertebra. In those circumstances, he brings this action against Daw, against C. A. Daw & Son, Ltd., and against the other defendants A & P. Steven, Ltd., who are lift engineers. After the accident, and on the same day, the plaintiff's solicitors wrote on his behalf to C. A. Daw & Son, Ltd., the persons entered on the rate book as the occupiers of the premises, calling attention to the accident, stating that the plaintiff had suffered injuries, and asking for an admission of liability. The answer to that, written by the Law Accident Insurance Society on behalf of C. A. Daw & Son, Ltd., was that they found that the accident was caused by the fracture of the lower gland of the cylinder of the lift. In their letter, dated July 1, they added:

> The lift is periodically inspected by one of the society's lift engineers and in addition there is a maintenance contract with Messrs. A. & P. Steven, Ltd., who had, in fact, as recently as the day preceding the occurrence, attended and repacked the gland in question. Having regard to all the circumstances, it is clear that our insured had taken every precaution to safeguard passengers using the lift, and we regret, therefore, we are unable to admit liability on our insured's behalf.

On July 9, the plaintiff's solicitors accordingly wrote to A. & P. Steven, Ltd., enclosing a copy of the letter which they had written to C. A. Daw & Son, Ltd., and saying this:

> We have now heard from their insurers that the accident was caused by the fracture of the lower gland on the cylinder. They say there is a maintenance contract with yourselves, and that you had in fact as recently as the day preceding the occurrence attended and repacked the gland in question. The insurance company, therefore, denies liability on behalf of their insured whom they contend had taken every precaution to safeguard passengers using the lift.

To this A. & P. Steven, Ltd., replied on July 10 as follows:

> We service many lifts for C. A. Daw & Son, Ltd., and our arrangement in the above case is a regular monthly visit to inspect, adjust and lubricate the lift. An additional visit is made about half-way through the month for the purpose of applying lubricant to the rams. Our arrangement includes the repacking of the two cylinder glands (or stuffing boxes) and the releathering of the control valve. These items are ordinary recurring items of service incidental to hydraulic lifts and the frequency depends on the age and condition of the machinery. Our arrangement does not include for the replacement or renewal of worn parts and we therefore disclaim any responsibility in this matter.

In those circumstances, this action is brought against both Daw and C. A. Daw & Son, Ltd., and A. & P. Steven, Ltd.

It is necessary at the outset to state a few more facts. Charles Bennett Daw is the owner of the block of flats in question. He inherited the flats, and, with other members of his family, who inherited other properties, he formed a limited company, the function of which, it was intended, should be the management of the properties, the lettings, the collection of rents and the general attendance on the tenants in order to ensure their enjoyment of reasonable comfort in the flats. However, Daw, as the owner of the flats, himself entered into the tenancy agreements. They were made with him, and he remained the occupier of the common staircase and the lift in the ordinary way in which one expects to find the landlord of a block of flats remaining in occupation. While he remained in occupation of the lift, however, he used the company as his agent to make all contracts and arrangements necessary for the running of the lift. He himself is one of the directors of C. A. Daw & Son, Ltd. (a nephew of his being the other and second director) and is also the secretary. Of course, the company remains a separate legal person and it was to the agency of that separate legal person that Daw delegated the making of all arrangements with regard to the control, the running, and, if necessary, the repair of the lift. Pursuant to that authority, the company had made two contracts in respect of that lift. They had apparently made the contract of insurance with the Law Accident Insurance Society, for the Law Accident Insurance Society treat the company as their insured. They had insured themselves, amongst other things, against third-party risks in respect of the lift. The other contract which they had made was one with A. & P. Steven, Ltd. That company had different types of maintenance contracts. Viewed in its widest sense, the contract which C. A. Daw & Son, Ltd., made with A. & P. Steven, Ltd., in respect of this lift was not a maintenance contract, for it was a contract under which A. & P. Steven, Ltd., undertook only very limited and defined duties. It was a contract once in every calendar month during working-hours to adjust, clean and lubricate the mechanism of the lift, to provide the cleaning materials and necessary lubricant, and also the packing materials for the glands and leather for the control valves, to attend also at all reasonable times during normal working-hours to adjust the mechanism in the case of stoppage or irregular running between the periodical visits, and to furnish signed reports after each periodical visit. There was another form of contract available if C. A. Daw & Son, Ltd., had been minded to hand over to A. & P. Steven, Ltd., the complete care and maintenance of this lift, which would have involved them in a larger payment to A. & P. Steven, Ltd., and under which A. & P. Steven, Ltd., would have undertaken, not merely those things which they undertook under the contract into which they did enter, but also the further duty of doing all repairs required to be done to the lift and discovered by them in the course of the currency of such contract.

Pursuant to that contract, A. & P. Steven, Ltd., periodically inspected this lift and adjusted, cleaned and lubricated the mechanism, supplying the necessary lubricant and repacking the gland when necessary and furnishing a signed report after each visit. After a certain time, at the request of Daw, they no longer furnished a written report after each visit, but undertook instead to let him know, either by ringing him up or by writing to him, if there was anything which required to be done to the lift. For 18 years before the happening of this accident, A. & P. Steven, Ltd., had performed their obligations under that contract.

The lift itself was installed, according to Daw, some 35 years ago, in about 1905 or 1906. During the 18 years which A. & P. Steven, Ltd., had been attending to it, it had never been taken down and completely overhauled. By 1940, therefore, it was an ageing piece of mechanism. There must have been wear and tear on the ram and on the packing. The retention of the water by the gland and the packing was essential if the lift was not to be allowed to fall to the bottom. If at any time the gland gave way, as it did on this occasion through fracture, so that the packing was blown out, the lift would be allowed to fall down. There would be no stopping it, and an accident such as this must necessarily occur.

In Oct., 1939, C. A. Daw & Son, Ltd., wrote to A. & P. Steven, Ltd., as follows:

> The hydraulic lifts at [Hornton Street and Hornton Court] are terribly slow in descending, although in the case of 12, Hornton Street the porter has greased the ram with some of the tallow you left with him. We shall be much obliged if you can do anything to make these two lifts come down more quickly.

A. & P. Steven, Ltd., took up the matter, and, with regard to the lift at Hornton Court East, where the accident I am considering took place, they wrote as follows:

> The descending speed is not due to the packings here for we have tried several patent packings without result. The latest special compensating packing rings which were specially manufactured gave out in four days and we had to revert to the usual rubber rings and hemp packing. We fear the trouble lies in the control valve and possibly in the exhaust pipe beyond. We are fitting a new valve spindle on Thursday and will check with a stop-watch.

On Nov. 8, A. & P. Steven, Ltd., wrote again to C. A. Daw & Son, Ltd., and, with reference to this particular lift, they gave the result of certain tests. They said with regard to Hornton Street:

> We sent our men in on Tuesday the 31st ultimo., to grease the rams at No. 12 Hornton St., with the following result: descending speed before greasing, 4·5 minutes; descending speed after greasing 55 seconds. The writer then questioned the porter as to his efforts at greasing and received the admission that he had only greased the small bottom (tubular) ram. The area of the top ram is very much greater and consequently friction has a greater effect. There is no need to say any more except that we may have to provide him with softer material than tallow. The writer then put in the whole of the Wednesday morning the 1st instant on a series of tests on the lift at Hornton Court East. Test No. 1, descending speed on arrival 65 seconds. Test No. 2, new spindle and a set of leathers fitted, descending speed 60 seconds. Test No. 3, exhaust pipe disconnected from control valve and lift allowed to exhaust freely into the pit—descending speed, 30 seconds. Test No. 4, pipe refixed, lift thoroughly lubricated, descending speed 55 seconds. Test No. 5, 2 cwts. placed in car under seat, descending speed 40 seconds; with 4 persons, 32 seconds. All tests, unless qualified, with empty car descending. The four weights, each weighing about half-cwt., left in the car. The result of these

> tests is to confirm the conclusion already held that the descending speed is due (1) to back pressure in the exhaust pipe line, probably internal corrosion over the years, and (2) friction of the special rubber rings used in the cylinder glands to prevent leakage of water. The rams of these hydraulic lifts are badly worn and scored. The diameter varies from place to place. Round rubber cord will hold up water on bad rams but unfortunately it wipes the grease off the steel, friction results and the lifts slow down. During the past two months we have spent about £8 in trial experiments with composition packing rings which we had specially manufactured by Messrs. John Allan & Sons of Glasgow whose representative also attended. These rings were made to suit the minimum diameter, the immediate result was excellent but they blew out after about 48 hours use. After two extended trials we had to revert to the old way of packing. All these lifts require to be fitted with new top and bottom rams but we know that you are disinclined to face this expenditure under present conditions. We doubt if we could obtain the necessary bars and tubes. We have discussed this matter before and the better plan is to electrify the lifts which also is probably out of the question at the moment. We suggest that we send our men in twice a month, the extra visit per month being merely to grease the rams at both blocks at Hornton Court and the rams at Hornton Street. We would manage to work this in for an additional charge of 10*s.* per month.

I need not read the rest of the letter. The answer to that on Nov. 10, again from C. A. Daw & Son, Ltd., with the signature C. B. Daw, showing that it was written in fact by C. B. Daw in his capacity as secretary of C. A. Daw & Son, Ltd., was as follows:

> For some time past you have said that new rams might be needed in the near future, especially at Hornton Court, but as you say at the present time, even if we could afford to replace the rams, it is more than doubtful if you could obtain the necessary steel. If we can keep the lifts running during the war, the question of replacing them with electric push-button lifts will arise as soon as peace is declared. As a war measure we agree your suggestion as to an extra visit each month for greasing the rams is probably the best solution; we note the extra charge will be 10*s.* per month.

The lift, therefore, was left as the subject of that arrangement. On Apr. 25, 1940, the Law Accident Insurance Society, the insurers covering the third-party risk, made their periodical inspection by their engineer, and on Apr. 29 they sent their report to Daw personally. That report was as follows:

> One of the engineer surveyors attended on the 25th inst. and made an examination of the above lift. We report the machine to be generally in good working order with the following exceptions . . .

The exceptions I need not read, because it is agreed by everybody in the case that those exceptions which were pointed out were matters which had nothing whatever to do with the accident. The other fact of importance is that on June 18 A. & P. Steven, Ltd., attended at the premises and repacked the bottom gland of this lift. That was the day before the accident, which occurred on June 19.

The first way in which the plaintiff seeks to put his case against Daw is this. He says that Daw was the occupier of this lift forming part of his own premises, and that he, the plaintiff, went upon those premises so occupied by Daw and went upon them for a lawful purpose, and in such circumstances that Daw owed him the duty which an occupier of premises owes to one who falls into the so-called category of invitee. The second way he puts it is that, if he was not in the category of invitees, he was in the category of licensees. It is first necessary to decide into which category the plaintiff is properly to be put. As VISCOUNT DUNEDIN said in *Addie (R.) & Sons (Collieries)* v. *Dumbreck* (1), at p. 372 :

> . . . in deciding cases of the class we are considering, the first duty of the tribunal is to fix once and for all into which of the three classes the person in question falls.

A It is not possible for me to hold that the plaintiff was in the class of invitees. An invitee is one who goes upon premises in the occupation of the person he makes defendant on business common to him and the occupier. He is requested to enter for the purposes of the occupier, and, where a landlord permits people to have access by staircase or by lift to B tenants of flats let by him, he remaining the occupier of the stairs or lift, the persons permitted by him to come upon those premises to have access to the tenants in their flats by means of the staircase or lift are in the category of licensees, and not in that of invitees. That appears to me to have been decided by *Fairman* v. *Perpetual Investment* C *Building Society* (2), where LORD WRENBURY said, at p. 95 :

> It is well to define at the outset what, in my judgment, is the relation between the plaintiff and the landlord in respect of which she can sue. There was no contractual relation. She was a person who, as between herself and the landlord, was entitled to use the landlord's staircase, because she was there rightly for the purpose of gaining access to premises which he had demised to a tenant with an implied right of use by the tenant and all persons lawfully resorting to the tenant's premises. D She was, I think, the invitee of the tenant, and, in consequence, the licensee of the landlord.

In *Ellis* v. *Fulham Borough Council* (3), MACKINNON, L.J., said, at p. 234 ([1937] 3 All E. R., at pp. 463, 464) :

> The question has been raised in this case whether this child ought to be regarded as an invitee or a licensee. The difference between the two may be in some cases E difficult of definition. The best definition, as it seems to me, to be derived from the cases is that very neatly stated in SALMOND ON TORTS, 9th Edn., p. 514, where he says that an invitee " is a person who receives permission from the occupier as a matter of business and not as a matter of grace. An invitation is a request to enter for the purposes of the occupier ; a licence is a permission to enter for the purposes of the entrant himself. The invitor says : ' I ask you to enter upon my business.' The licensor says, ' I permit you to enter on your own business.' "

F Applying those tests to the plaintiff's situation, it appears to me that he was not invited to enter for the purposes of the occupier, Daw. He was permitted to enter the lift for his own purposes in making his call on the tenant to whom Daw had demised one of the flats.

If the plaintiff had been an invitee, it is clear that Daw would have G owed him the highest measure of duty. He would have owed him the duty to exercise reasonable care to have the premises reasonably safe for him. However, the plaintiff being merely a licensee, the duty which Daw owed him was the duty to warn him of any danger of which Daw actually knew. It is said that Daw, on the evidence, actually knew of H the danger of this lift. Daw is a layman. He a man of education, but he is not an engineer, nor do I gather that he is a scientist. He knew that the maintenance of water pressure depended on the condition of the ram and the packing of the gland on the ram, and he knew that if anything broke in the cylinder, water would come out and would let the lift down. He knew that the effectiveness of the packing of the ram depended on its not having a scored and irregular surface. I think that he might well know those things, and might think that the result would be that the lift would not work very satisfactorily, but I think that that is different from realising that there was actual danger in the further working of the lift if the alternative method of extra lubrication and packing with rubber rings were the method adopted. I do not think it is right to hold that Daw knew that there was any danger in running the lift. While I am sure that he was anxious to exercise all possible economy in dealing with this lift, he is not a man, I am sure, who would have run that lift if he had really had it brought to his mind and attention that he was exposing persons to actual danger if he let them use the lift. In those circumstances, I think that, so far as the claim against Daw is based upon a breach of the duty which arose by reason of the relationship of occupier of the premises on the one hand, and a licensee upon those premises on the other, it fails.

However, the position of Daw and that of the company in this matter does not by any means stop there. What I am in about to say about the case as it is made against him on any doctrine of law will, I think, express what Daw's situation would have been if the plaintiff had been an invitee and not a licensee. The other way in which the case is put as against Daw and the company is this. It is said that the position here is not the same as where a landlord and occupier merely permits somebody to pass over his land or property. Here Daw, through his servant, undertook to carry the plaintiff from the ground floor to the fifth floor, and, in undertaking that conveyance of the plaintiff, he undertook a measure of duty towards him which was different from that which he would owe to the plaintiff as a mere licensee allowed to walk over his premises or some part of them. It is said that Daw gratuitously carried the plaintiff as a passenger in his vehicle, the lift, and undertook the duty which a carrier of a passenger undertakes to a passenger as a matter of law. Counsel for the first and third defendants contends that that measure of duty, since the contract was one of gratuitous carriage, is only the same measure of duty as Daw would owe as a landlord licensing the plaintiff to walk over his premises, except that he did undertake the additional duty of care in the actual carrying out of the conveying of the plaintiff, care in the driving and management of the lift.

In the first place, there appears to me to be no true distinction to be drawn between the position of a person who, as the owner and occupier of the moving vehicle, undertakes the carriage of a passenger in the horizontal plane and that of one who, as the owner and occupier of a lift, undertakes to convey persons in the vertical plane. That the person who undertakes to carry a person gratuitously and accepts the duty of carrying him undertakes a duty to carry him with reasonable care is conceded. That of itself, it seems to me, shows as a first step that there is no analogy between the situation of a mere licensee permitted by an occupier to pass over some part of his premises and that of a passenger gratuitously carried by another who is the owner and occupier of a vehicle. In *Harris* v. *Perry & Co.* (4), where the plaintiff was having a ride upon a contractor's locomotive, SIR RICHARD HENN COLLINS, M.R., talking of the judge's analysis of the evidence and exposition of the law, said, at p. 225 :

> He suggested that the measure of duty towards a bare licensee is different, where the licensor accepts the duty of carrying him, from what it is where he merely permits him to pass through his premises ; and I think the cases support this view.

Later he said, at p. 226 :

> The principle in all cases of this class is that the care exercised must be reasonable ; and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty. There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse the premises of another and in the case where a person or his property is received into the custody of another for transportation : see in the case of goods, *Southcote's Case* (5), cited in *Coggs* v. *Bernard* (6), and the notes thereto. In the case of persons received for carriage, PARKE, B., says in *Lygo* v. *Newbold* (7) [p. 305] : "A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care." In *Austin* v. *Great Western Ry. Co.* (8), BLACKBURN, J., says [p. 445] : "I think that what was said in the case of *Marshall* v. *York, Newcastle & Berwick Ry. Co.* (9) was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." It seems to me that these authorities imply a larger obligation than that of merely not setting a trap.

If that is the principle to be applied, does that mean that, in undertaking the carriage of a person gratuitously, a man undertakes no more than to exercise reasonable care in the conduct and control of the vehicle during the journey ? It appears to me that, if the duty be to transport the passenger with reasonable care, it must extend to the employment of reasonable care in and about the condition of the vehicle, as well as in and about its conduct and control, and that a carrier of passengers is under an obligation to use reasonable care to provide a vehicle reasonably safe for the carriage has been the law for a long time. In *Christie* v. *Griggs* (10), the plaintiff proved that, while he was travelling to London on the Blackwell stage coach, the axle-tree snapped and he was thrown from the top of the coach and injured, and he proved those facts only. It was contended that there was no case to answer, because, as it was said in argument, at p. 80 :

> . . . the plaintiff was bound to proceed farther and give evidence, either of the driver being unskilful, or of the coach being insufficient.

In his judgment, SIR JAMES MANSFIELD ruled that the plaintiff [p. 80] :

> . . . has made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show, that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found.

Later he said, at p. 81 ;

> There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking, as to them, went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance.

That may be putting the duty and obligation very high, but that case is still cited as an authority in the textbooks, and, in my opinion, when the defendant Daw undertook the carriage of the plaintiff in this lift, he was under a duty to use reasonable care to provide a vehicle reasonably safe for the conveyance of the plaintiff, as well as to exercise reasonable care in the conduct of that vehicle throughout the course of the journey. In my view, he had not exercised reasonable care in and about the provision of a vehicle reasonably safe. I have called attention to the matters which had been brought to his notice in the letter of Nov. 8, 1939, from A. & P. Steven, Ltd. Those matters, called thus to his attention, coupled with his knowledge of the working of the lift, certainly, if he was to discharge his duty with regard to taking reasonable care to provide a lift reasonably safe, made it incumbent upon him at least to direct his mind to the question as to whether those matters were such as would lead to any danger in the use of the lift. He says that he did not direct his mind to it. He knew enough about the lift, I think, to know that at any rate those matters called for an investigation into the question whether they lessened the security of the lift beyond a reasonable point. It was sought to be answered that, even if it was his duty to take reasonable care to provide a reasonably safe lift for the carriage of passengers, none the less he did it in the best way in which he could do it as a person not himself an expert in lifts. He employed a firm of expert engineers. The answer to that appears to me to lie in the facts of this case. He did not put himself in the hands of A. & P. Steven, Ltd. He did not leave this matter of the upkeep and sufficient repair and maintenance of his lift to them. If he had done so and had done so completely, it might have been said with the greatest force that there is no other step which a man who is a layman, and not an expert, and who is an owner of such a thing as this lift, can take which can more properly discharge his duty to take reasonable care that it is in safe running order than to place it in the hands of absolute experts.

I have called attention to the details of the contract which he selected from the different contracts for maintenance offered by A. & P. Steven, Ltd. He chose one which did not entitle them to do repairs which they might think essential. It is true that the contract threw upon them the duty to report, and it is true that Laing, of A. & P. Steven, Ltd, said :

> I accepted the situation that the duty to report cast a duty upon me to tell Daw if there was any dangerous condition of the lift or anything which required to be done.

It must be remembered, however, that, when in fact, in the circumstances which we have before us, A. & P. Steven, Ltd., advised things as necessary to be done, Daw chose for himself whether or not he would do them. Laing indicates that for some two years before the letter of Nov. 8 he had been calling Daw's attention to the worn and grooved condition of the ram. In the letter of Nov. 8, he said to Daw :

"All these lifts require to be fitted with new top and bottom rams, but he added:

> . . . we know that you are disinclined to face this expenditure under present conditions . . . We have discussed this matter before and the better plan is to electrify the lifts . . .

A Then he pointed out that meanwhile there was a possible way of keeping them going until the end of the war, and that was with the extra lubrication. That was one instance. In other words, Daw rejected the advice to have new rams. If he had had new rams, nobody in this case has contended anything except that this accident would not have happened. On B another occasion, quite early, so far as this correspondence is concerned, A. & P. Steven, Ltd., advised him that a rope required renewal in this very lift at Hornton Court East, a rope of no less importance than the control rope, be it observed, the cost of which would be 47*s*. Daw did not accept the situation of having to depend upon A. & P. Steven, Ltd., C as his advisers to whom he was deferring because of their having a knowledge which he did not possess. Through the company managing the property for him he replied that they had inspected the front section of the control rope, and that, although the hemp outer covering was badly frayed at the hall level, the rope was perfectly sound, and he suggested D that it could quite well be turned top to bottom. For nine months that control rope which on May 6, 1937, A. & P. Steven, Ltd., had advised should be renewed was not renewed. Again, after this accident, Laing had fitted a new gun-metal gland on the ram and had reported to Daw that tests had revealed that there were curious effects on the gland as a E result of the unevenness of the ram's surface, and that the unevenness of the ram's surface was obviously in some way placing varying strains on the gland. When Daw was advised that the rams must be taken out at once, so far from regarding himself as in the hands of A. & P. Steven, Ltd., he decided that they must carry on with the lift as it was until F August, when the rams could be taken out with less inconvenience to his tenants. In those circumstances, it appears to me that Daw and his agent, the company, advised themselves upon what repairs should be done and what renewals should be made to this lift, and had not placed themselves in the hands of the experts, A. & P. Steven, Ltd. If G there was a failure to take reasonable care to provide a reasonably safe lift, they cannot answer it by saying: "We have done the best we could by employing an expert." It is plain that there was a failure to take reasonable care to provide a reasonably safe lift. When Daw's attention was called specifically by A. & P. Steven, Ltd., to the worn condition of H the rams, and when he had their opinion that all their efforts at specially-constructed packings had failed and that this lift required new rams, then, in my view, his duty was to ascertain, first of all, whether that lift could be run safely with the rams in that condition and with that gland. I say with that gland, because both Daw and A. & P. Steven, Ltd., knew that a gland of that type had given way before. He could not, in my view, discharge his duty to take reasonable care to see that the lift was reasonably safe for the carriage of passengers by doing nothing, more especially when one couples with the facts I have already mentioned the further fact that he knew that the lift was 35 years old. He must have known that it had never been taken down and thoroughly overhauled during, at any rate, the last 18 years, and, as a reasonable man, he ought to have anticipated that the state of affairs indicated to him might mean the presence of danger in the lift for passengers using it.

Daw was the owner of the lift and the occupier, but, as I have said, he delegated to the company all the arrangements with regard to the lift, including keeping it in a safe running condition, and it was the failure to keep the lift in a reasonably safe running condition, in my view, which was one of the factors bringing about the accident. If he delegated those duties to the company and, acting within the scope of the authority thus received, they failed in those duties in acting on his behalf, he is clearly responsible. Whether they have a responsibility is not quite so plain, because Daw has told me, and I do not see any reason to doubt it, that the porter who worked the lift was his servant employed by him. He was rather vague as to whether he employed him personally or whether he employed him in his capacity as secretary of C. A. Daw & Son, Ltd. However, it was not in the management of the lift on the actual day that the cause of the accident was to be found. It was in the management of the lift in the way of making arrangements so that it should be safe for the carriage of passengers. It was Daw who undertook the carriage of the passengers, and not the company, and it was Daw who failed in the duty he owed to the passengers he undertook to carry through the failure of the company to perform the duty delegated to it by him. That does not seem to me to put any responsibility on the company actually as a tortfeasor. There is, in my view, though, a case made against Daw.

With regard to A. & P. Steven, Ltd., it is said that they have no responsibility, in the first place because they owed no duty to the plaintiff in respect of what they had to do to this lift, there being no relationship between them and the plaintiff which would give the plaintiff the right to enforce against them the obligation to use reasonable care in what they did to the lift. That is the first thing which is said. The second thing which is said is that all that they had to do was to perform that which they undertook to do in the contract with the person with whom they contracted. What was it that caused the accident in closer detail? Their contract, which involved the repacking of this gland, involved, of course, that they should repack the gland with reasonable skill and care. Did they do that? I have come to the conclusion that on this occasion that happened which is liable to happen even with most skilful workmen, and even with the most careful employers. That is to say, although they sent a man who was a reasonably skilled man, on this occasion he did not, in doing what he had to do, exercise reasonable skill and care as that expression is understood in law. I think the fair conclusion on the evidence is that this accident was brought about through the gland having been put on in a tilted position by Efford, an employee of A. & P. Steven, Ltd., on June 18, 1940, and, having been put on in that tilted position on this worn ram, scored and worn as it was, it would throw additional strains on the bolts, that one of the bolts snapped and the fracture of the gland occurred as it did. That being so, I think that the cause of the accident was the failure on this particular occasion of A. & P. Steven, Ltd., through their workman to do that contractual work of repacking the gland with reasonable skill and care.

That being so, the next question is whether the plaintiff can recover against A. & P. Steven, Ltd., for their failure to do the work they did on this lift with reasonable skill and care. First, one has to remember that this lift was a lift for the conveyance of passengers. The work in question was work which, on the evidence, it is clear that A. & P. Steven, Ltd., knew would result in danger, or might result in danger. Certainly, I think, it would result in danger to passengers in the lift unless it was done with reasonable skill and care. It was work which was to be done in circumstances where no intermediate examination could reasonably be anticipated between the carrying out of the work and the use of the lift for the carriage of passengers, so that the passengers would therefore be subjected to the danger incidental to any failure on the part of A. & P. Steven, Ltd., to do the work with reasonable skill and care. Counsel for the second defendant contended that the matter was concluded by *Earl* v. *Lubbock* (11) and that, in the face of *Earl* v. *Lubbock* (11), the plaintiff here could not succeed as against A. & P. Steven, Ltd. *Earl* v. *Lubbock* (11) is—and I think this is what LORD ATKIN said about it in *M'Alister (or Donoghue)* v. *Stevenson* (12)—a case where a servant was claiming that he had a right as a matter of law to the benefit of a contract made by a repairer with his master. It was a claim based on contract. Here the plaintiff does not base his claim against A. & P. Steven, Ltd., on the contract which they had made with C. A. Daw & Son, Ltd. He bases his claim on the duty which, he says, in the particular circumstances, A. & P. Steven, Ltd., owed to him as one of the persons using the lift in the way in which they knew the lift would be used after their work upon it had been done.

What are the circumstances which are essential for the establishment by the plaintiff of such a relationship between him and A. & P. Steven, Ltd.? I think that the answer is to be found in the cases since *M'Alister (or Donoghue)* v. *Stevenson* (12) and based upon that case and on the doctrine enunciated therein. The application of the principle of *M'Alister (or Donoghue)* v. *Stevenson* (12) is to be found in *Grant* v. *Australian Knitting Mills, Ltd.* (13), and is applied to repairers of an article in *Stennett* v. *Hancock & Peters* (14), *Herschthal* v. *Stewart & Ardern, Ltd.* (15) and *Malfroot* v. *Noxal, Ltd.* (16). I need not go through all those cases, but it emerges from them clearly that a repairer of an article, just as the maker of an article, may, in particular circumstances, place himself in so close a relationship to an ultimate user of the article as to give rise to a duty, enforceable against him by the user of the article, to do the work which he has to do on the article with skill and care. Where repairs are done to an article which will be dangerous to its users unless the repairs are done with reasonable skill and care, and where such repairs are done in circumstances where, after they are done, no intermediate examination can reasonably be anticipated between the completion of the repairs and the use of the article, the repairer owes a duty to the user, and the user, though he has no immediate contract with the repairer, can enforce the liability on the part of the repairer to do his work with reasonable skill and care, and can recover against him if, through his failing in that duty, the user suffers injury and loss.

It is not for me, I think, to go through all these decisions yet again. I have referred to them and to the judgments in them because the effect of them is to show that a person who is in the position of the plaintiff in this case, using this lift the very day after A. & P. Steven, Ltd., had done their work upon the gland, was using it in circumstances where there was no opportunity for any intermediate examination or for the operation upon the lift of any independent agency. The work which A. & P. Steven, Ltd., had done was work done to an article which they knew would be rendered dangerous unless they did that work with reasonable skill and care.

In the circumstances, as a result of the cases, I have no doubt that, as the law stands at present, the plaintiff's case is not answered, as counsel for the second defendant sought to answer it, by reliance upon *Earl* v. *Lubbock* (11). There is one other case to which I will refer in this connection, because it seems to me to illuminate the topic, and that is the judgment of Atkinson, J., in *Buckner* v. *Ashby & Horner, Ltd.* (17). After discussing what was said in *M'Alister* (*or Donoghue*) v. *Stevenson* (12), and after dealing with the question of the extent to which *Earl* v. *Lubbock* (11) affords any answer, Atkinson, J., said, at p. 241 :

> In other words, if a contractor knows that his work, if negligently done, may expose others besides his contracting parties to danger, and that it will be used without intermediate examination or test, he is under a duty to those persons. That principle was applied in *Malfroot* v. *Noxal, Ltd.* (16) . . . If *Earl* v. *Lubbock* (11) were being tried to-day and the case were properly pleaded and based on negligence, instead of on breach of contract, it would, I imagine, be held that the defendant knew perfectly well that there would be no intermediate examination of the vans which he was supposed to have overhauled, and that he would be held liable : that is, if negligence were proved.

I agree, if I may respectfully say so, with an observation made later in that judgment by Atkinson, J., at p. 241, that there is a passage in Beven on Negligence, 4th Edn., pp. 45, 46, which it is useful to bear in mind as containing the key to this particular question of law. The result is that A. & P. Steven, Ltd., knew that, unless they did the work they were doing with reasonable care, that work would result, as I have said, in a lift dangerous for the carriage of passengers. They knew that, between their doing that work and the use of the lift by such a person as this plaintiff, there would not intervene any conscious agency which might or could convert the mischief set up by any negligent work done by them to the lift, and they remain, in my view of the law, on the cases as they stand, liable to the plaintiff, who has an enforceable remedy against them. In those circumstances, the plaintiff succeeds against them upon that basis, and against Daw, and fails against C. A. Daw & Son, Ltd.

Judgment for the plaintiff for £750 against the second and third defendants.

Solicitors: *Simmons & Simmons* (for the plaintiff); *Kenneth Brown, Baker, Baker* (for the first defendants and for the third defendants); *Carpenters* (for the second defendant).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

Re SAMUEL, JACOBS *v.* RAMSDEN.

[CHANCERY DIVISION (Bennett, J.), **March 21, 26, 28, 31, 1941.**]

Wills—Conditions—Forfeiture—Uncertainty—" Marriage with a person who is not of Jewish parentage and of the Jewish faith."

The testator by cl. 8 of his will inserted a condition subsequent whereby his children would forfeit their interests under his will if they married " a person who is not of Jewish parentage and of the Jewish faith." One of the testator's daughters married a man who, it was admitted, was neither of Jewish parentage nor of the Jewish faith. The trustees issued a summons to determine, *inter alia*, whether this clause was void for uncertainty :—

HELD : it was not possible to ascertain exactly what the testator meant by this condition. The words " of Jewish parentage " might refer to race or religion, and, in order to determine whether a person was " of the Jewish faith," it would be necessary for the court to inquire into the state of a person's mind. The clause was, therefore, void for uncertainty.

[**EDITORIAL NOTE.** In this case, BENNETT, J., as he says, has preferred to follow the decision in *Re Blaiberg, Blaiberg* v. *De Andia Yrarrzaval* (3), for, if that case has been wrongly decided, it is better that the error, if any, should be corrected by the Court of Appeal. At the same time, he has pointed out that the decision of the Privy Council in *Sifton* v. *Sifton* (1) gives strong support to the argument that the clause in the will is so vague in its meaning as to be void for uncertainty.

AS TO CONDITIONS OF FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 34, pp. 105-109, paras. 141-143 ; and FOR CASE, see DIGEST, Vol. 44, p. 462, No. 2825.]

Cases referred to :

(1) *Sifton* v. *Sifton*, [1938] A.C. 656 ; [1938] 3 All E.R. 435 ; Digest Supp. ; 107 L.J.P.C. 97 ; 159 L.T. 289.

(2) *Clavering* v. *Ellison* (1859), 7 H.L. Cas. 707 ; 44 Digest 440, *2667* ; 29 L.J.Ch. 761 ; *affg.* (1857), 8 De G. M. & G. 662 ; *affg.* (1856), 3 Drew. 451.

(3) *Re Blaiberg, Blaiberg* v. *De Andia Yrarrzaval* (*Marquise*), [1940] 1 Ch. 385 ; [1940] 1 All E.R. 632 ; Digest Supp.

Adjourned Summons to determine, *inter alia*, whether cl. 8 of the will of the testator, Barnett Samuel, was void for uncertainty. The facts are fully set out in the judgment.

R. F. Roxburgh, K.C., and *H. O. Danckwerts* for the plaintiffs, the trustees of the will.

C. V. Rawlence for the first defendant, the trustee of a deed of settlement.

Humphrey King for the second defendant, a granddaughter of the testator.

Gilbert Beyfus, K.C., and *C. A. J. Bonner* for the third defendants, incumbrancers of one of the shares under the will.

H. B. Vaisey, K.C., and *E. M. Winterbotham* for the fourth defendant, a daughter of the testator.

J. Neville Gray, K.C., and *P. B. Morle* for the remaining defendants, other parties interested under the will.

Bennett, J.: The question I have to decide is whether or not a condition of forfeiture in the will of the testator, Barnett Samuel, is void for uncertainty. It arises in connection with a legacy, and a share of the residue which he settled upon his daughter, a defendant, now Edna Violet Clayton. The will is dated Feb. 24, 1915, and the testator died on June 2, 1925. He had four children, a son, who is dead, and three daughters. One daughter is the defendant Olga Esther Roys, another is the plaintiff Amelia Jacobs, and the third is the defendant Edna Violet Clayton. By cl. 5 (*c*) of his will, the testator settled a pecuniary legacy of £17,000 to be held by trustees upon like trusts and powers as were thereinafter declared concerning the share of his residuary trust fund thereby settled upon his daughter Mrs. Clayton and her issue. The residue of the estate is dealt with by cl. 7. He gives the income to his wife during her life, and, after her death, by cl. 7 (*b*):

> . . . upon trust as to both capital and income . . . for all and every my children or my child (if only one) who being male have attained or shall attain the age of 21 years or being female have attained or shall attain that age or have married or shall marry under that age and if more than one in equal shares as tenants in common.

Then by cl. 7 (*c*) he settles the share of any daughter in his residuary trust fund. The income is to be paid to the daughter during her life and during coverture for her separate use without power of anticipation, and from and after her decease she is given power of appointment over her share amongst her children or remoter issue. In default of appointment, her children take equally as tenants in common, and there is a power to appoint that the income of the whole or any part of the share shall be paid to any husband of the daughter who may survive her. Then cl. 8, which has given rise to the question on the summons, provides as follows:

> Notwithstanding anything hereinbefore contained I declare that if my said son Ivor Dudley Samuel or my said daughter Edna Samuel [now the defendant Edna

> Violet Clayton] shall at any time after my death contract a marriage with a person who is not of Jewish parentage and of the Jewish Faith then as from the date of such marriage all the trusts powers and provisions in this my will contained and at that date subsisting and capable of taking effect thereafter in favour of (*a*) my said son or daughter (as the case may be) contracting such marriage or (*b*) the person with whom he or she shall contract such marriage or any subsequent marriage or (*c*) any child or children thereafter to be born of him or her or (*d*) the issue of any such last-mentioned child or children shall cease and determine and be no longer exercisable and this my will shall thenceforth operate and take effect as if my said son or daughter (as the case may be) had died at the date of such marriage but so nevertheless that nothing in this clause contained shall affect any act or thing done or permitted by my trustees in the execution of the trusts hereof prior to the date of such marriage.

After the death of the testator, his daughter, the defendant Mrs. Clayton, married on Mar. 5, 1927. It is said in para. 6 of her affidavit that Harold Clayton, her husband, is not, and never has been at any time, either of Jewish parentage or of the Jewish faith, and evidence has been filed from which it appears that the parents of Harold Clayton were apparently both Wesleyan Methodists, that he was educated at Charterhouse, where he was confirmed. There are at present no children of Mrs. Clayton, so one has to consider whether the facts upon which the plaintiff relies as establishing forfeiture have been sufficiently proved as against possible children of Mrs. Clayton. Mrs. Clayton herself does not suggest that her husband is either of Jewish parentage or of the Jewish faith. Upon the material before me, I think that I can come to the conclusion that, construe the words as one will, Harold Clayton was neither of Jewish parentage nor of the Jewish faith. In other words, I think that I may act upon the footing that, whatever his faith may be now, he ws brought up as a Christian, that there was no Jewish blood in the veins of his parents, and that neither of them descended from the patriarch Jacob or had any faith in the Jewish religion.

Upon her father's death, Mrs. Clayton took a vested interest during her life in the income of the settled legacy of £17,000 and in a share of the testator's residuary estate. Clause 8 of her father's will is a condition subsequent which, if the condition it contains be broken, defeats the trust which the will contains in favour of Mrs. Clayton and her children, and destroys the powers which the will contains under which Mrs. Clayton is empowered to make appointments in favour of her children and an appointment in favour of her husband. The question is whether the condition, being a condition subsequent, is void for uncertainty. It has reference to the qualifications of the man whom Mrs. Clayton marries. He has to have two qualifications, and, if either of them be broken, then, according to the terms of the will, the trusts in favour of Mrs. Clayton and her children are brought to an end. The qualifications are (i) that the husband is to be of Jewish parentage, and (ii) that he is to be of the Jewish faith. Both phrases, when one comes critically to examine them, are of doubtful meaning, although I suppose that most people, when they say with respect to a person, without thinking very much what they mean, that he is a Jew, think that they know what they mean to say. After the discussion which has taken place, one wonders whether they really do, and whether, when they say of a man that he is a Jew, they have reference to his religion or to his race. I do not suppose that most people when they speak in that way really think about it. However, I have to find out, first of all, if I can, what this testator meant when he said that his daughter was to forfeit her interest under his will if she married somebody who was not of Jewish parentage. What is meant by those words "of Jewish parentage"? Have they reference to the race or to the religion of the husband's parents? If they have reference to the religion of the husband's parents, have they reference to the religion of both of the husband's parents? If they have reference to the religion of both of the husband's parents, then at what point of time? When one comes to look at the words closely, it becomes clear, I think, that the words are capable of having quite a number of meanings. Counsel for the plaintiffs suggested that primarily the words had reference to the race of the parents, although, in considering the race of the parents, one could also look at their religion, but that, *prima facie*, the words had reference to their race. When one speaks of a man's race in this connection, what does one mean? What is meant by a person being of the Jewish race? Does that mean that he is in direct descent, both in the male line and in the female line, from the patriarch Jacob? I do not know. I suppose that it does, because I believe that Jews are Israelites, and that Israelites are persons who are descended from the patriarch Jacob. That is one possible view, that it has reference to race. The other view, advanced by counsel for the third defendants, was that it had no reference to race at all, that race had not to be considered in the matter, and that the sole question was the religion of both parents at the moment of the husband's birth. He said that there was no difficulty about that, because everybody knew that in these days religion was organised, and that it was possible to find out whether or not the father of the husband and the mother of the husband were members of a religious community professing the Jewish faith. If they were, at the date when the husband was born, the condition had been fulfilled. If they were not, the condition had been broken. With these possible meanings to be put upon the words, the question is whether the condition is so precise and distinct that effect can be given to it, or whether the condition is void for uncertainty. I think that the law is now summarised in a judgment of LORD ROMER in *Sifton* v. *Sifton* (1), a decision of the Privy Council, where property was devised in trust to pay to the testator's daughter a sum sufficient in the judgment of the trustees to maintain her suitably until she was 40 years of age, after which the whole of the income of the estate was to be paid to her annually. The payments to the testator's daughter were to be made to her "only so long as she shall continue to reside in Canada." The Privy Council held that the provision that the payments were to be made "only so long as she shall continue to reside in Canada" was a condition subsequent which was void for uncertainty. The decision was founded upon a principle enunciated by LORD CRANWORTH in *Clavering* v. *Ellison* (2). LORD ROMER, at p. 675 ([1938]

3 All E.R., at p. 442), cites the passage from the opinion of LORD CRANWORTH, and then, having considered the judgments of the judges in the courts below, goes on to use this language, at p. 675 ([1938] 3 All E.R., at pp. 445, 446) :

> Their Lordships' attention was called during the arguments to numerous authorities in which the court has been called upon to consider the meaning of the words "reside" and "residence," and the like. But these authorities give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used. A condition, for instance, attached to the devise of a house that the devisee should reside in the house for at least 6 weeks in a year can present no difficulty. In some contexts the word "reside" may clearly denote what is sometimes called "being in residence" at a particular house. In other contexts it may mean merely maintaining a house in a fit state for residence. It is plain, however, that in the present case the word "reside" means something different from either being in residence or merely maintaining a residence. No one can suppose that the testator intended either that his daughter should never leave Canada, or that so long as she maintained a residence in Canada she might spend the whole of her time abroad. He must have intended that, though Canada was to be her home in general, yet she was to be at liberty to leave Canada for some purposes and for some periods of time. Unfortunately, he omitted to define either the purposes or the periods. The result is that the majority of the Court of Appeal have found themselves unable to give any more precise direction than that the appellant may leave Canada for a limited period and for a purely temporary purpose, without being able to define either the word "limited" or the word "temporary."

I think that it is quite plain from thejudgment of LORD ROMER that the language which that testator used in its context was language the meaning of which it was not possible to define precisely or distinctly, and it was so because there was nothing in the will of the testator which gave any clue as to the sense in which he had used the word "reside" in his will. In this will, there is not a trace of any indication which I can see as to the sense in which this testator used the words "of Jewish parentage." There is nothing to indicate whether he had used them with reference to the race of the parents or whether he had used them with reference to their religion. The conclusion at which I have arrived in regard to that condition is, founding myself upon the authority of LORD ROMER in *Sifton* v. *Sifton* (1), that the condition is void for uncertainty.

However, the condition operates if the husbands fails to have either of the two qualifications—that is, if he is not of the Jewish faith or if he is not of Jewish parentage—so one also has to consider the condition, "not of the Jewish faith." It is said, and truly said, that that particular condition of forfeiture has already been decided by MORTON, J., in *Re Blaiberg, Blaiberg* v. *De Andia Yrarrzaval* (*Marquise*) (3) to be a condition void for uncertainty. Before the court can say whether or not a person is of a particular religious belief, it has to inquire into the state of that person's mind, and, as MORTON, J., said, at p. 391 ([1940] 1 All E.R., at p. 636), the court is unable to ascertain with certainty the state of a person's mind. MORTON, J., followed an earlier unreported decision of FARWELL, J., upon the same will. It is conceded by those who are arguing for the validity of the condition that the decisions cover the point, but the argument is that they are against the current of authority, and that the earlier cases on the subject were not brought to the attention of either FARWELL, J., or MORTON, J., and it does look as if some of the cases which have been cited to me were not called to their attention. It is also said, and truly said, that there are in statutes imposing penalties references to persons of the Jewish religion who are exempt in certain circumstances from those penalties, and, in those cases, Parliament has cast upon magistrates the duty of inquiring into the state of a person's religious belief in order that they may find out whether or not the person charged is subject to the penalties. I have been rather pressed with the argument that the decisions of Farwell, J., and of Morton, J., may have been given in circumstances in which all relevant matters were not called to their attention. At the same time, however, as the words here are identical with those upon which Morton, J., had to adjudicate, I do not think that it would be either right or wise of me to give a decision contrary to his decision. It would only tend, I think, to confuse the law. It is much better in a matter of that kind, I think, for the question to be considered and decided by a higher tribunal. I propose to follow the decision of Morton, J., in *Blaiberg's* case (3), and to decide that the condition of forfeiture in the case of the marriage of the testator's daughter to a person not of the Jewish faith is void for uncertainty. The result is that the provisions of cl. 8 of the testator's will are void for uncertainty.

Solicitors: *Hunt & Hunt* (for the plaintiffs); *Burton & Ramsden* (for the first defendants); *Whitehouse, Gibson & Oldershaw* (for the second and last defendants); *H. M. Lyell* (for the third defendants); *L. A. Hart* (for the fourth defendant).

[*Reported by* Irene G. R. Moses, *Barrister-at-Law.*]

NOTE.

DALTON MAIN COLLIERIES, LTD. *v.* ROSSINGTON MAIN COLLIERY CO., LTD., AND AMALGAMATED DENABY COLLIERIES, LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **April 4, 1941**.]

The Court of Appeal dismissed an appeal from the judgment of Farwell, J., reported [1940] 4 All E.R. 384, Sir Wilfrid Greene, M.R., stating that the judgment of Farwell, J., commended itself to him and that he agreed with it. He added that, unless the interpretation placed by Farwell, J., upon the Doncaster Area Drainage Act, 1929, s. 12 (3), was right, the burden of royalties would be left upon the shoulders of the working lessee, which was the very thing the legislature did not intend. Leave to appeal to the House of Lords was refused.

Re DESTONE FABRICS, LTD.

[CHANCERY DIVISION (Simonds, J.), **March 26, 1941.**]

Companies—Debentures—Floating charge—Created within 6 *months of winding up—Not for benefit of company—Validity—Companies Act,* 1929 (c. 23), *s.* 266.

The company owed three of its creditors (amongst whom were two of its directors) sums amounting to £900. On Apr. 1, 1940, at which time the company was insolvent, a debenture for £900, secured by a floating charge, was issued to one Z., who was in fact merely the nominee of one of the creditors. The debenture money was paid into the bank on Apr. 12, and on the same day the company paid these creditors sums exceeding £900 owing to them by the company. On May 3, a petition was presented for the winding up of the company, and the liquidator, pursuant to the Companies Act, 1929, s. 266, claimed that the charge created by the debenture was invalid, on the ground that cash was not paid to the company :—

HELD : the transaction, though in form a payment of cash to the company, was not one in substance. The company merely acted as a conduit pipe to give these unsecured creditors a preference, and the charge was, therefore, invalid.

[**EDITORIAL NOTE.** The test in such a case as this is whether the transaction is *bona fide* for the benefit of the company or merely for the benefit of certain creditors to the prejudice of others. The matter is perhaps of more importance than may at first appear, since, when a company is in difficulties, someone can often be found to help a company for the time being if his position can be secured and it is certain that any security he may take will not be held to be invalid by the court.

AS TO FLOATING CHARGE WITHIN 6 MONTHS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 706, 707, paras. 1182-1184 ; and FOR CASES, see DIGEST, Vol. 10, pp. 752, 753, Nos. 4699-4711.]

Cases referred to :

(1) *Re Matthew Ellis, Ltd.*, [1933] Ch. 458 ; Digest Supp. ; 102 L.J.Ch. 65 ; 148 L.T. 434.

(2) *Re Orleans Motor Co., Ltd.*, [1911] 2 Ch. 41 ; 10 Digest 752, *4699* ; 80 L.J.Ch. 477 ; *sub nom. Re Orleans Motor Co., Ltd., Smyth* v. *Orleans Motor Co., Ltd.*, 104 L.T. 627.

ADJOURNED SUMMONS asking for a declaration that a floating charge created by a debenture dated Apr. 1, 1940, was invalid. The facts are fully set out in the judgment.

H. Wynn Parry, K.C., and *T. D. D. Divine* for the liquidator.

W. P. Spens, K.C., and *J. Pennycuick* for the respondents.

SIMONDS, J. : This is a summons by the liquidator of Destone Fabrics, Ltd., asking for a declaration that the floating charge expressed to be created by a debenture dated Apr. 1, 1940, and issued by the company to one Jack Zimmerman, is invalid, and for other consequential relief. The application is made under the Companies Act, 1929, s. 266, which provides that, where a company is being wound up, a floating charge on the undertaking or property of the company created within six months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except for the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge, together with interest as provided by the section.

This company was incorporated on Aug. 3, 1939, with a capital of £500, divided into 500 shares of £1 each. The directors of the company at all material times were a Mrs. Stone and one Edward Braunstein, and the business of the company was at all material times controlled by David Stone, the husband of Mrs. Stone. The shares were at all material times held as to 499 by Mrs. Stone and as to the remaining share by Braunstein. The company was formed to carry on a business previously carried on by the Stones, or by one of them, under the name of D. S. Fabrics.

The date of the debenture was Apr. 1, 1940, and it is clear beyond all possible doubt that at the time the company was hopelessly insolvent. Amongst other debts, it owed its bank a large sum on overdraft. It owed Mrs. Stone £350, it owed Braunstein £350, and it owed one Reginald Maurice Davis, as a contingent creditor, the amount which he should pay in respect of his guarantee of the company's overdraft due to the bank, which was limited to the sum of £200. It is not unfair to say that, at the date of the issue of the debenture, Davis could regard himself as a creditor in the sum of £200. The company was ordered by this court to be wound up on May 27, 1940, upon a petition which was presented on May 3, 1940, which latter date was the commencement of the winding up for the purposes of the section. Thus, it is clear that the company was insolvent within six months of the commencement of the winding up, and the question for the determination of the court is whether to any extent, and, if so, to what extent, cash was paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge.

It is clear that in form at least, if not in substance, cash was paid to the company. I am satisfied by the evidence that a sum of £900 was, on Apr. 12, 1940, paid into the company's banking account, and I am equally satisfied that on the same day there was paid out of that account £350 to Braunstein, £350 to Mrs. Stone and £200 to Mr. Davis. The question is whether I am to treat the payment as a payment of cash to the company both in form and in substance.

The first question which was raised was this. It will be noticed that the debenture was issued to one Zimmerman, whom I have not yet mentioned except as a person to whom the debenture was issued, and it has been argued that Zimmerman was the real principal in this case. If that fact were established, I think that it would be of first-rate importance in the case. It is not denied that the money which Zimmerman paid to the bank had been provided immediately before that payment by Davis, but it is urged, nevertheless, that Zimmerman was the real principal, and was desirous of making an investment by way of lending money to this company on the security of this debenture, having procured Davis to lend the money to him in order that he might be in a position to make that investment. I have had the advantage of hearing the evidence of Zimmerman, but I have not had the advantage of hearing the evidence of Davis, although he was in court during the hearing. In those circumstances, I remain wholly unconvinced as to the truth of this highly improbable story. I do not think it necessary to go through the evidence in detail. It is sufficient for me to say that I find as a fact that the money which was advanced to the company, and which was paid into the company's account and afterwards paid out of it, was money provided by Davis as principal, and that throughout the transaction Zimmerman, to whom the debenture was issued, was nothing more than the agent or nominee, and, in the event which happened, the trustee of the debenture for Davis. What it comes to, then, is that I am to regard this money as money paid to the company by Davis, and it is in the light of that fact that I must now examine the transaction to see whether, in substance as well as in form, this was cash paid to the company within the meaning of sect. 266.

It is obvious from what I have said that, so far as Davis himself was concerned, the transaction was one by which he became, instead of an unsecured contingent creditor in the sum of £200, a secured creditor in the sum of £900, having had paid off the £200 for which he was liable by the company. Moreover, it is quite clear, I think, that, so far as he was concerned, the transaction was a mere subterfuge, and, to use the words of an authority to which I shall refer, the company was a mere conduit pipe through which a sum was paid, part of which was paid out afterwards to him.

I have the minutes of the meeting of Apr. 1, 1940, the date upon which the debenture was purported to be issued, although in fact the money was not paid into the bank until Apr. 12. On that day, Mrs. Stone and Braunstein, the directors of the company, met, and it was reported to the meeting that Jack Zimmerman, whose address was given, had offered to lend the company the sum of £900 upon the security of a debenture to carry interest at 5 per cent. per annum. It was resolved that this offer should be accepted, and the company's solicitor was instructed to prepare the debenture, which was produced and sealed in the presence of two directors and the secretary. It is to be remembered that at this time the company was insolvent, and of that fact the directors must have been well aware. Further, they must have been aware that the company could not be put on its legs merely by the provision of the sum of £900 whereby to pay off certain of its creditors. It could be put on its legs and its future secured only by a substantial sum of working capital being obtained. From that observation there flows the consequence that the purpose of this debenture was nothing more than that by the issue of it a sum of money might be provided whereby the debenture holder himself, or the person for whom he was trustee, and the directors might have a sum of money provided which would not in any way advantage the company but which would largely advantage themselves, placing them in a better position than that of the other unsecured creditors of the company.

It is in the light of these facts that I have to consider whether this was in substance and in form cash paid to the company. In *Re Matthew Ellis, Ltd.* (1), the question of what is cash paid to the company within A the meaning of the section was considered at some length by the Court of Appeal, and the result emerges from that case that at least it is a matter for the consideration of all the circumstances of the case, with the warning that it is not fatal to the validity of the debenture that the money in respect of which it is issued is provided upon a condition that it shall be B devoted to the payment off of certain debts. That is not, by itself, a fact fatal to the validity of the debenture, but I cannot help thinking that, in considering all the circumstances, it is a fact to which consideration has to be given. I am assisted by the observations of Romer, L.J., in *Re Matthew Ellis, Ltd.* (1), at pp. 477, 478 : C

> There are, of course, certain considerations for the issue of a debenture which plainly do not amount to payments in cash. Where, for instance, an existing creditor of a company takes a debenture from the company to secure the amount of his debt on the terms that he shall not immediately press for payment of his debt, or where he takes a debenture for the amount of his debt on the terms that the debt itself is to be extinguished, obviously no cash passes from the debenture holder to the company. If in such a case he goes through the form of drawing a cheque in favour D of the company for the amount of his debt on the terms that the company shall forthwith itself hand to him in exchange a cheque for the same amount, there has in form been a payment in cash. But in such a case there has not been a payment in cash if one looks at the substance and not at the form, and in considering whether there has been a payment in cash within the meaning of sect. 266 it is always the question of substance that must be regarded and not the question of form.

Then he deals with *Re Orleans Motor Co., Ltd.* (2), in which Parker, J., E had to consider the question, and says, at p. 478 :

> Parker, J., had a case to decide under the section (or rather the section of the earlier Act which corresponds to sect. 266 of the present Act) in *Re Orleans Motor Co., Ltd.* (2). In that case directors of a company who had guaranteed the company's overdraft were being pressed by the bank, as indeed was the company, for repayment of the overdraft. £1,500 was the amount that the bank required to be paid. The F company was liable for it as principal debtor and the directors were liable for it as guarantors. The company being unable to pay, the obvious thing would have been for the guarantors to pay the £1,500, in which case they would have been unsecured creditors of the company for that amount. Instead of that, they went through the form of handing three cheques for £500 to the company on the terms that the company should hand those cheques over to the bank and issue debentures for the amount to them, and they then said that they had paid cash to the company. Parker, J., G was not misled by such a transparent subterfuge, and held that there had not in fact been any cash paid. The directors had not parted with any cash to the company and never intended to part with any cash to it. The company never received any cash from the directors and never contemplated receiving any cash from them. All that had happened was that the directors had, using the company as a conduit pipe, paid £1,500 cash to the bank. Of course, that debenture was invalidated by the section.

H

Of course, the facts of each case differ from those of other cases, and the facts in *Re Orleans Motor Co., Ltd.* (2), as explained by Romer, L.J., differ in some respects from the facts of this case, but I think that I too am entitled to say that in this case the court will not be misled by that transparent subterfuge. Here I find it impossible to believe that the purpose of this transaction was anything other than by the issue of this security to procure the payment to certain of the directors—and payment also to Davis, who was himself advancing the money on the security of the debenture—in preference to other creditors of the company of the sums due to them.

The ultimate test in such cases may well be whether the transaction is to be regarded as one intended *bona fide* for the benefit of the company or whether it is intended merely to provide certain moneys, not for the benefit of the company, but for the benefit of certain creditors of the company to the prejudice of other creditors of the company. In such cases—and I have no doubt that this is one of them—a question of fraudulent preference must also arise. With that aspect of the case I am not immediately concerned, but I am satisfied that this transaction was one in which, not the advantage of the company, but the benefit to themselves was the object of its contrivers. They merely used the company's banking account as a means by which their ends could be attained. In those circumstances, I must hold that the floating charge created by the debenture is wholly invalid. From that, it ensues that the order must be such a declaration as I have indicated, and that the respondents must deliver up to the applicant possession of, or account to him for, the property purported to be comprised in such floating charge, which came to the hands of the respondent through the receiver appointed under the debenture. The respondents must pay the costs of this application.

Floating charge declared invalid. Costs to be paid by respondents.

Solicitors: *T. J. Robinson & Son* (for the liquidator); *H. Fishman & Co.* (for the respondents).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

R. *v.* RECORDER OF BURNLEY, *Ex parte* NEW EMPIRE (BURNLEY), LTD. (No. 2).

[COURT OF APPEAL (Scott, MacKinnon and Luxmoore, L.JJ.), **March 17, 1941.**]

Solicitors—Costs—Town clerk also clerk to assessment committee—Fees to be paid to corporation—Right to recover profit costs.

A town clerk who was a solicitor was engaged upon the terms that his salary was to include all his charges as a solicitor when acting for the corporation. The corporation appointed the town clerk to be the clerk of the assessment committee and he acted for them in certain litigation between the assessment committee and a ratepayer. In the bill of costs, the assessment committee charged the profit costs of the solicitor and it was contended that, having regard to the terms of the solicitor's engagement with the corporation, such costs could not be allowed on taxation:—

HELD: such costs were properly allowed on taxation, the litigation here being between parties who were not parties to the agreement between the solicitor and the corporation.

[**EDITORIAL NOTE.** This is an important point on costs. A party recovering costs from an opponent is in law only entitled to be indemnified against his actual expenditure in costs. Hence, to put the matter briefly, where a town clerk, who is a solicitor and is paid a salary which is to include his fees in all litigation conducted by him for the council, acts for the council, he cannot recover his profit costs if it is shown that, in relation to the salary paid to him, they would be more than an indemnity to the council in respect of their costs. The whole matter is very clearly stated in the judgment of CHANNELL, J., in *Henderson* v. *Merthyr Tydfil Urban District Council*, [1900] 1 Q.B. 434; 42 Digest 130, *1243*. In the present case it was sought to be said that the position is the same when the town clerk acts for the assessment committee; but the Court of Appeal have held that, despite the intimate relation between the council and the assessment committee, they are distinct parties, and the assessment committee is entitled to tax its costs without any reference to the fact that the solicitor acting for it was a town clerk in receipt of what may be termed an inclusive salary.

FOR THE LAW ON THE SUBJECT, see HALSBURY, Hailsham Edn., Vol. 31, p. 167, para. 200; and FOR CASES, see DIGEST, Vol. 42, p. 130, Nos. 1241-1243.]

APPEAL by the New Empire (Burnley), Ltd., from an order of WROTTESLEY, J., dated Feb. 25, 1941. The facts are fully set out in the judgment of SCOTT, L.J.

B. H. Waddy for the appellants.

C. Erskine Simes for the respondent.

Waddy: The point at issue is whether or not the Burnley Assessment Committee are entitled to recover their solicitor's costs. The Burnley Assessment Committee draw the funds to meet their expenses from the Burnley Corporation. The assessment committee were not liable to pay their solicitor anything in respect of profit costs. He was paid a salary as town clerk. As the solicitor was not entitled to be paid profit costs, the appellants should not be required to pay anything in respect of those costs. A successful litigant cannot recover as costs from an unsuccessful litigant any more than the successful litigant is liable to pay. The assessment committee cannot recover profit costs in the present case, because the solicitor is paid a salary by a statutory body. The body to which the solicitor has to hand over the fees is the body which provides them. The fees which it is sought to get from the appellants are fees which the corporation have to find and which the corporation would get back. The judge in chambers decided against the appellants, on the ground that the assessment committee get their money from the Burnley Corporation by precept, and not by action.

Simes: The solicitor has done the work, and he is entitled to be paid. The facts upon which the appellants rely are irrelevant. The Burnley Corporation and the Burnley Assessment Committee are separate corporate bodies. [He was stopped by the court.]

SCOTT, L.J.: This is an appeal against an order of WROTTESLEY, J., refusing to review a taxation of costs on an objection stated on behalf of the New Empire (Burnley), Ltd., in proceedings in the King's Bench Division in which the New Empire (Burnley), Ltd., sought writs of *certiorari* and *mandamus*, and failed. In the bill of costs there were included the solicitor's profit costs as well as the out-of-pocket expenses and so on. It is said here by the appellants from the decision of Wrottesley, J., who refused to review that taxation, and did not assent to the objections to it made on behalf of the New Empire (Burnley), Ltd., that the position of the solicitor in question was wholly exceptional, because he was the clerk to the assessment committee, and he was appointed to be clerk to the assessment committee by the Burnley Corporation, whose town clerk he was. That corporation, as we know, under the Rating and Valuation Act, 1925, defray the expenses of the assessment committee at Burnley. To the extent of two-thirds of the members of the assessment committee, they are appointed by the corporation. The town clerk was employed by the Burnley Corporation on the terms of being paid a salary and nothing more, and the corporation were entitled to any profits which he might make on work done in acting as a solicitor, if he did so act. It is said that, because of the identity of the clerk of the assessment committee with the town clerk, the assessment committee were not entitled to charge any profit costs for the work done by him for them. My view is that Wrottesley, J., was entirely right in saying that those were matters as between third parties under a contract to which the assessment committee was not a party, and that there is nothing in those facts to displace the ordinary presumption that a solicitor acting for a client is entitled, to use the expression in old common law language, as on a *quantum meruit* for the work done, which would be, no doubt, the costs as defined by the Solicitors Act at the present time. It is a claim for services rendered and work done on the usual terms, and there is nothing to displace that fundamental basis of the relationship between the corporation and the solicitor when the clerk to the assessment committee does work for the assessment committee as a solicitor. For these reasons, I think that the appeal must be dismissed with costs.

MacKinnon, L.J.: I agree.

Luxmoore, L.J.: I also agree.

Appeal dismissed with costs.

Solicitors: *Peacock & Goddard*, agents for *Percy H. Barker & Co.*, Manchester (for the appellants); *Kenneth Brown, Baker, Baker*, agents for *Harry Plowman*, Town Clerk, Burnley (for the respondent).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

NEWELL *v.* GILLINGHAM CORPORATION.

[King's Bench Division (Atkinson, J.)], **March 27, 31, April 1, 1941**.]

Master and Servant—Apprenticeship—Dismissal of apprentice—Conduct likely to lead to loss of time on part of other employees—Breach of covenant in apprenticeship deed—Apprentice a minor.

The plaintiff, an infant, was bound by a deed of apprenticeship to serve the defendants for a period of 5 years expiring on Mar. 9, 1941. This deed contained a clause enabling the corporation to dismiss the plaintiff "if he should be wilfully disobedient or . . . slothful or negligent or otherwise grossly misbehave himself." The plaintiff registered as a conscientious objector, and, as a result, the appropriate committee of the corporation passed a resolution that his services should be dispensed with. He was consequently discharged on June 5, 1940, and brought an action to recover damages, alleging loss of wages and postponement of his opportunity to qualify as a surveyor. It was found as a fact that, apart from registering as a conscientious objector, his conduct was such as would irritate his fellow-workmen and lead to a loss of the employer's time :—

Held : while the conduct of the plaintiff was such as might justify the dismissal of an adult from employment, it did not entitle the defendants to terminate a contract of apprenticeship.

[**EDITORIAL NOTE.** All that need be said here is that what is said is not based upon the fact that the plaintiff was a conscientious objector, but upon the fact that his conversation and conduct were such as might lead to a waste of time by the other employees.

As to Apprenticeship Deeds, see HALSBURY, Hailsham Edn., Vol. 22, pp. 175, 176, para. 294 ; and for Cases, see DIGEST, Vol. 34, pp. 510, 511, Nos. 4249-4258.]

Action for damages for wrongful dismissal under a deed of apprenticeship. The facts are fully set out in the judgment.

F. W. Beney for the plaintiff.

A. Melford Stevenson for the defendant.

Atkinson, J. : On Sept. 1, 1936, the defendants entered into a deed of apprenticeship with the plaintiff and his father under which the plaintiff was apprenticed to the corporation for a term of 5 years from Mar. 9, 1936, and that period would have expired on Mar. 9, 1941. The apprentice undertook faithfully, honestly and diligently to serve the corporation, to attend day or evening classes, to keep the corporation's secrets, to obey the corporation's lawful and reasonable commands, not knowingly to do or to suffer to be done any damage or injury to the corporation, and to conduct himself as an honest and faithful apprentice ought to do. The corporation bound themselves to see that he was properly taught the craft of a carpenter, and there was a scale of wages at certain percentages of the hourly rate of pay payable to journeymen at any particular time. Then followed this clause :

> Should the apprentice be wilfully disobedient or be slothful or negligent or otherwise grossly misbehave himself the corporation may discharge the apprentice from their service.

The defendants attempted to determine the deed by a notice dated June 5, 1940, and the question is whether they have been able to justify what they did.

The plaintiff had let it be known that he was a conscientious objector, and the employers knew—from him, I suppose—that he had registered as a conscientious objector. As a result, on June 4, 1940, a resolution was passed in the following terms:

> In answer to a question by Councillor Owen as to whether there were any other conscientious objectors to military service in the corporation's employ, the borough surveyor stated that E. H. A. Newell, an apprenticed carpenter, had registered as a conscientious objector. The committee considered the matter and the town clerk explained the position under the deed of apprenticeship. Resolved that the services of E. H. A. Newell be dispensed with forthwith and that he be paid wages in lieu of notice.

That was on June 4, 1940. That was carried out, and the plaintiff received his wages and was dismissed. Attempts were made by his union to induce the defendants to change their view, but the defendants adhered to it. The plaintiff's solicitor made another attempt later on, but without success, and, as a result, this action was brought.

It is difficult to support the argument that the mere fact that the boy was a conscientious objector could justify the corporation in what they did, but it is said here that a master who dismisses his servant because he is a bad one is entitled in law to rely on anything he may have found out afterwards which would have justified his dismissal if he had known of it. The defendants here have set up a case which they seek to bring within that principle. I think that there may be a great deal in what counsel for the plaintiff says—namely, that that rule cannot possibly apply to the case of a deed of apprenticeship unless that which is proved amounts to a breach of one of the covenants in the deed. Although, at the time of the dismissal, the corporation did not know of any breach of the covenant which would have entitled them to terminate the apprenticeship, I imagine that they might possibly have been entitled to rely on it afterwards. However, on the view which I take, it is not necessary to rely on those points.

The legislature has thought it right to say that, if this young man can satisfy the tribunal that he has a conscientious objection to defending his own or the country's liberty or freedom, or protecting women and children from organised massacre from the air, or protecting our sea-borne supplies of food upon which he lives, he shall be exempted from military service, and, if he is a conscientious objector, he has a right to register as such and try to satisfy the tribunal that he has that conscientious objection. He succeeded in satisfying them. There has been a body of evidence called here by the defendants, and I believe that evidence. I think that it was given by truthful witnesses, and, in my view, it is perfectly plain that the plaintiff was not a conscientious objector in the true sense. He was a political conscientious objector. A true conscientious objector, which is what Parliament had in mind, is one who on religious grounds thinks it wrong to kill and to resist force by force.

He thinks that that is the teaching of Christ. The true conscientious objector remembers other undoubted teachings of Christ—namely, to help the injured, the suffering and the helpless—and remembers that there is such a thing as duty. The true conscientious objector is ready to do ambulance work, rescue work, A.R.P. work and work among the helpless in shelters. There are many conscientious objectors who have proved the genuineness of their belief by that which they have done. This plaintiff likened himself to Quakers. Everybody knows the fine work done by Quakers, particularly in the last war. One remembers the work they did on mine-sweepers, probably the most dangerous work there is. They were logical in their views. They recognised their duty to do all they could except to kill if need be. The true conscientious objector is loyal to his country. He is not pro-German. He does not scoff at what other people do, and he is not a defeatist. It is plain that the plaintiff was not a true conscientious objector in any sense of the word, and I can well imagine that his conduct would be most irritating to his fellow-workmen, and might lead to breaches of the peace and loss of the workmen's time. Not one of these men gave evidence that the plaintiff ever said that it was wrong or foolish to fight. The plaintiff's attitude was that it was silly to be a member of the A.R.P. or to be a member of a rescue squad. It was better, instead of building ships, to turn out pots and pans. He was pro-German. From what he said, the Germans were always right and we were wrong. He deliberately spread lies, backed up by some correspondence. He was a defeatist. The government was always wrong. The Germans were going to win and we were going to lose. He pooh-poohed everything. His arguments were all based on political considerations, and not on religious considerations. There are two things which show what a humbug the man is. He admitted that he said he disapproved of the policy of the British Government. He was asked whether that was before the war or after the war. One can remember his confusion. He said: "No. It was before the war." Before the war, I suppose, if any government was striving for peace, our government was. He was against the government before the war when they were striving for peace, and he is against them during the war when they are not striving for peace. He was asked why he did not do any A.R.P. work, and he said: "I think that is a dodge to escape military service." An answer of that sort, in my view, shows the true character of the plaintiff in this case. That sort of conduct is totally alien to that of the true conscientious objector. In my view, if that sort of thing had been done and said by a grown man, it might very well be that employers would be justified in putting an end to any contract of employment, but the plaintiff is not a grown man. He is only twenty years of age, and he was not employed under the ordinary contract of employment. He was employed under a contract of apprenticeship, and my view is that that conduct was not such as entitled them to put an end to this deed—at any rate, unless the plaintiff had been brought up before the borough surveyor, or someone in authority, and had had an extremely serious warning of the danger of the sort of thing he was doing and saying. Therefore, although I can well understand the view employers might take of that sort of conduct, in this case I am bound to hold, and do hold, that it did not justify the termination of the deed of apprenticeship.

The plaintiff has not satisfied me that the damages are other than nominal. There has been a technical breach of the covenants in the deed, and I give judgment for the plaintiff for £5, with whatever costs a judgment of that amount carries.

Judgment for the plaintiff for £5.

Solicitors: *Arnold Carter & Co.* (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *Robert Booth*, Town Clerk, Gillingham (for the defendants).

[*Reported by* D. K. BELCHER, *Barrister-at-Law.*]

WESTON *v.* LONDON COUNTY COUNCIL.

[KING'S BENCH DIVISION (Wrottesley, J.), **March 10, 11, 1941.**]

Factories and Shops—Factory—Technical institute carried on by local authority—Factories Act, 1937 (*c.* 67), *s.* 151 (9).

The plaintiff was injured while working a wood-cutting machine at a technical institute of the defendants. He was a pupil of the institute, but was a man of 31 years of age who had had considerable experience of such machinery. At the time of the accident, he was attempting to perform an operation in a wrong way upon a machine insufficiently guarded. The instructor was close by and expected to be called to the plaintiff before the latter commenced the operation, but the plaintiff, after adjusting the machine himself, proceeded to work it without asking the instructor whether he had correctly adjusted it. The plaintiff contended that the institute was a factory within the Factories Act, 1937:—

HELD: (i) the institute was not a factory within the Factories Act, 1937.

(ii) the defendants were not liable at common law, because the conduct of the plaintiff in not obeying the instructions given to him was the cause of the accident.

[**EDITORIAL NOTE.** The real contest here was the attempt to bring the case of a technical institute within the definition of a factory in the Factories Act, 1937. As is well-known, many places, which would not in ordinary language be called factories, are factories within that definition. The main argument here was based upon the provision that (put shortly) premises of public authorities are not to be considered not to be factories although the work there is not carried on for profit. It is held, however, that this is qualified by the other provisions, and really means that such places, if they would be factories within the definition if they did not belong to public authorities, are not to be placed outside the definition merely because, in the case of a public authority, the work is not carried on for profit. It has not the effect of enlarging the definition in the case of public authorities.

AS TO FACTORIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 561-567, paras. 1071-1076; and FOR CASES, see DIGEST, Vol. 24, pp. 897-902, Nos. 1-36.]

Case referred to:

(1) *Wood* v. *London County Council*, [1940] 2 K.B. 642; [1940] 4 All E.R. 149; Digest Supp.

ACTION for damages for personal injuries. The plaintiff relied upon a breach of statutory duty under the Factories Act, 1937 and also upon negligence at common law. The facts are fully set out in the judgment.

David Weitzman for the plaintiff.

R. T. Monier-Williams for the defendants.

WROTTESLEY, J.: In this case, the plaintiff, William Weston, after many years in a woodworking factory was anxious to improve himself and to learn to use new machines and new processes. So far as I can gather, his mechanical experience had been on sand-papering machines, and so he took lessons or instructions at the Hackney Technical Institute, conducted by the defendants, the London County Council. It is an institution mainly for the instruction of adults, or of people who are more than boys and girls. There were three machines about which he desired to receive instruction, and, after some lessons on one of them, he turned to the verticle spindle machine used for cutting moulded edges and joining grooves on pieces of wood. It is a dangerous machine, consisting of a spindle which revolves at a very high speed carrying two little knives or cutters made of very tough steel. The wood is pushed past the spindle, and, as it revolves, the knives cut into the wood and cut out the moulding in the desired form. In line with this spindle, one on either side, are two guides, or fences, as they are called. The three articles, therefore, being in line, the work is done by taking a piece of wood and pushing it along in front of the guides until the end of the wood reaches the revolving spindle and the knives cut out the moulding. The method by which this is done is a pushing process by the pressure of the hand on the piece of wood, as distinct from a pulling process.

There were only two lessons in this sense upon this particular machine. In the first lesson, the instructor, Hoare, who was called before me as a witness, showed the plaintiff how to make a groove, and how to make a moulding, and he also showed him how to make the knives. When I say that he showed the plaintiff, I mean that he did it and the plaintiff imitated what he was shown, and, in the result, all the work was done by the pupil himself. When the second lesson came to be given, the knives or cutters had already been made by the plaintiff in the course of the previous lesson, and Hoare, the instructor, inserted them in the spindle, clamped them down, and possibly showed the effect on a piece of wood. At any rate, he then told the plaintiff to dismantle and reassemble the spindle with the knives in position, because those knives must obviously be most carefully adjusted if they are to give the desired results and cut to the required depth and no further. At that stage, Hoare left the plaintiff and went to another pupil. The plaintiff proceeded to insert the knives, and Hoare came back and tested the adjustment by applying the power. He came to the conclusion that the knives were not correctly set, and that one stuck out too far or not far enough. This was pointed out to the plaintiff, and he was told to reassemble them properly, Hoare pointing out what was wrong. Again Hoare left the plaintiff to make the necessary adjustment, to do which he would have to unscrew the spindle partly and reset the knives, or one of them. Hoare went away to another pupil, but he expected to be called back to verify that the machine was right and was properly adjusted before it was tested again or any power applied.

There was no doubt that the plaintiff, who was quite intelligent, and who had had a very long experience in this kind of thing, knew that the teacher was there at his disposal. If he wanted him, he had only to call, when Hoare would come back and ascertain whether the adjustment of the knives was right, and would supervise the use of them. The plaintiff did not do that. He was content with what he had done in the way of adjustment, and he took up a piece of wood, turned the power on, and began to work. The correct method of doing the work, as demonstrated to me by all the witnesses, was to push the piece of wood from right to left, pushing it past the knives, but unfortunately the plaintiff did not do that. I am not quite sure why he did not do so, but the explanation he gave me was that he had a piece of wood which was already worked in part by himself, and that he did not wish to do anything to interfere with that work, so that, instead of pushing the wood past the knives, he did, in fact, make an experiment. That is to say, instead of standing, so to speak, behind the spindle and pushing the wood across it, he got, as it were, to the left of it, or in front of it, and pulled the wood past the spindle. I am perfectly satisfied that the pulling past is not satisfactory. It is difficult and dangerous, and the reason is this. The spindle revolves counter-clockwise, so that, in pulling this piece of wood instead of pushing it, one has not got the weight one would have when it is pushed. The result is that the machine rejects the wood and throws it out. That appears to produce a condition of things which needs correcting. The person operating the machine is then apt to do what is called "backing." That is to say, he passes the wood from left to right instead of from right to left, as is the proper way. That is exactly what happened in this case, and the results of the way in which the wood touched the knives, was thrown off, and touched again are to be found on the piece of wood in use at the time of the accident, together with another sign of the disaster in the form of a spot of blood. This piece of wood was picked up from the floor after the accident. Unfortunately, this backing resulted in the wood being rapidly drawn back, with the plaintiff's fingers upon it, and his little finger, therefore, was drawn on to the left of the revolving knives, and so badly cut that he has had to have it amputated. Hoare, the instructor, was not there, and the first he knew of what had taken place was that he heard a noise, turned round, and saw that the accident had occurred.

Those are the facts as I find them, and the question is whether, in those circumstances, the London County Council are at law liable to compensate the plaintiff for the loss of his finger. The first consideration which arises is this. Does the Factories Act, 1937, apply to this technical institute ? If it does, there are certain obligations in regard to fencing, and there is no doubt that this machine was not fenced at this time. *Prima facie,* of course, a technical institute is not a factory, but the Factories Act, 1937, applies to places which are not factories in the ordinary accepted use of the word. The general definition of a factory is to be found in sect. 151, which provides as follows :

> (1) Subject to the provisions of this section, the expression "factory" means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely : (*a*) the making of any article or of part of any article . . . or (*c*) the adapting for sale of any article, being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control . . .

As far as that is concerned, I do not think that anyone could suggest that this institute falls within that general definition. In the first place, while it is true that manual labour takes place here, I do not think that there are any persons, other than the instructor, employed in manual labour here in any process, nor do I think that the persons engaged here are engaged in a process which is for or incidental to any of the purposes there set out, such as the making of articles, the altering of articles or adapting them for sale. I think, in the first place, that those persons are not employed, as I say, because I do not think that the word "employed" there means busy, or engaged, or occupied. Further, in so far as they are occupied, they are not occupied in a process which is incidental to any of the purposes mentioned, and it appears to me that they are there for the purposes of instruction. Whether or not I am right in that, it is quite clear that they are not occupied or employed there by way of trade, or in any work which is carried on by way of trade or any work which is carried on for gain, so that the institute is not premises within the general definition to be found in the Factories Act, 1937, s. 151. However, the section goes on to say that there are premises which may not fall within that general definition but which, nevertheless, Parliament has thought right to subject to the various forms of control which are exercised on a factory, and a list of special cases is set out. The only special case coming anywhere near this case, as far as I can find, is subclause (x). Sect. 151 (1) (*c*) continues as follows :

> And (whether or not they are factories by reason of the foregoing definition) the expression "factory" also includes the following premises in which persons are employed in manual labour, that is to say . . . any premises in which mechanical power is used in connection with the making or repairing of articles of metal or wood incidentally to any business carried on by way of trade or for purposes of gain.

There being neither trade nor purpose of gain here, that special case cannot be said to cover this case of a technical institute.

Then comes the suggestion strongly urged by counsel for the plaintiff that sect. 151 (9) is in terms which clearly and expressly cover technical
A institutes of this kind. Sect. 151 (9) provides as follows:

> Any premises belonging to or in the occupation of the Crown or any municipal or other public authority shall not be deemed not to be a factory . . . by reason only that the work carried on thereat is not carried on by way of trade or for purposes of gain.

B It is common ground in this case, I understand, that, for the purpose of that section, the London County Council are either a local or a public authority. Actually, they are a public authority. Thus, it is said that, since they are a public authority, and are the owners of these premises, one can re-read the general definition and strike out the words
C "premises in which" the work is "carried on by way of trade or for purposes of gain." The object and intent of that subsection is to cover all those activities, whether by servants of the Crown or by public or local authorities, which would not be covered by the Act—namely, great employers of labour, such as the Crown, on the one hand, and local
D authorities, on the other hand, all kinds of factories and other premises which appear in the special list, and all those factories and other premises which, because their product is not trade or articles sold or made for the purpose of gain, would, but for some such subsection, fail to fall within the control imposed by the Factories Act, 1937. This
E proviso, it is to be observed, is of a fairly lengthy kind. It does not say that premises belonging to, or in the occupation of, a public body shall be factories if they comply with the other particulars in the definition. It says that they are not to be deemed not to be a factory because the work carried on in them is not carried on by way of trade or for the
F purpose of gain.

The decision of TUCKER, J., which has been cited to me, in *Wood* v. *London County Council* (1) is an instance of something which the judge said clearly falls within the Factories Act, 1937, but for those words. A school or college, however, is not a factory, and the scholars
G or pupils are not employed by those who own the school or by those who teach in it. Nothing could have caused Parliament more surprise, when they were discussing the merits and difficulties of the new factory legislation in 1937, than to be told that all the time they were legislating for schools, colleges and technical institutes. It is not that there is
H not much in the Factories Act, 1937, which is clearly applicable to any place where machines are worked on, but rather that there are many other provisions in the Act which are quite clearly inapplicable to schools or institutes.

One of the witnesses for the defence pointed out in the course of his evidence that the principal danger to be guarded against is, not so much the inexperience of the learner, although that is of importance, as the contempt which familiarity brings in the case of a repetition process-worker using dangerous tools day after day and hour after hour. Nevertheless, of course, Parliament may have used language in the Factories Act, 1937, which in its literal meaning includes educational processes, but by using the words "employment," "employer" and "employed," it has not used such language, in my opinion. If it were necessary, one could multiply the proposition by turning to sect. 152 (4), (5), (6), dealing with apprentices. Sect. 154, and possibly sect. 104, support the proposition that Parliament did not intend by the words "persons who are employed" to cover scholars, pupils and learners. Generally, therefore, while technical schools and colleges are in many particulars to enforce at least the standard laid down in the Factories Act, 1937, there are many other respects in which the provisions of that Act are quite inappropriate to them, and, if I am right, it is not, at any rate, to that Act that I have to resort in order to find out the duty of the London County Council in regard to a technical institute under its control. Therefore, I need not consider the regulations nor the conditions of the Factories Act, 1937, ss. 14, 16.

I now come to the question of whether, apart from this Act, the facts disclose a neglect of duty on the part of the London County Council towards the plaintiff. Unless the council has done something wrong by itself, and unless that something wrong caused the accident, however sorry I may be for the plaintiff, I cannot, of course, give him the ratepayers' money to compensate him. First of all, the degree of care which the tutor owes the pupil must, I think, depend on the nature of the pupil. I have not here to deal with the case of a child, a boy or a girl. The plaintiff is a man of 31 years of age who is not illiterate, and whose life has been spent in a woodworking machine shop, where guards are in common use, and are used on machinery of this type. The plaintiff himself told me of some of the sorts of guards which he has seen in the machine shops where he has worked, and which he has been in the habit of passing. I certainly am not going to assume that the council instructor would not very soon ascertain how far advanced he was, and ascertain that he did know about woodworking shops and woodworking machines. That being the nature of the man who came for instruction, I am not prepared to say that it was unreasonable or careless, in the circumstances of this case, first of all to leave a grown man of that experience to adjust those knives while the instructor went away to another machine to help and guide another pupil. It is not irrelevant, and I accept it, that, when working on other machines, the plaintiff had been instructed not to start up the machine until the instructor had told him that all was safe. Again the plaintiff said: "If there was a notice, I never noticed it." There was a notice produced in court, and it reads as follows:

> Notice. Hackney Institute Woodworking Machinery. Students must not operate any machines unless assured by the instructor in charge that all guards are in position.

I do not say that that is by any means an excuse for a body like the London County Council or for the instructor whom they employed, because it is quite obvious that a notice of that kind would be only too readily disregarded if the instructor encouraged the students to disregard it.

There is another thing. The process of backing, as it has been called—namely, passing the wood from left to right in front of the knives, as opposed to standing behind it and pushing it from behind past the knives—had been explained to the plaintiff. He told me this :

> I was not passing the wood from left to right. I will not be sure. I may have done so inadvertently. To pass from left to right was the very thing Mr. Hoare had told me not to do, and what I now know is dangerous. The way I was doing it I had no intention of passing the wood from left to right, which is called backing. It is done, however, as everybody knows, and anyone can make a slip. I thought the machines were all right and that the fences were guards.

He had been told that he must not back, and I do not think that he was backing on purpose. What he was doing was experimenting. He told me that he was pulling instead of pushing, and that appears to be something he did entirely on his own. What he said in regard to that was this :

> I did not want to spoil the work I had done, so I thought I would use the other end, so I put my hand to the left of the spindle and tried to pull it past, holding my hands past the cutters. As I did that the cutters pulled against me and pulled the wood against my hands, so that my little finger got up against the cutters. I know now I did wrong. I did know then Mr. Hoare had told me once not to come back on the spindle or come back on the wood from left to right but always right to left.

I do not think that the plaintiff intended to do what he did, but what he was told not to do was not to pass the wood in front of the knives, in order to engage it, and then bring it forward again. That, I do think, he had been told quite clearly not to do, and I think that his own recollection confirms that. That was really what brought about this accident—namely, an act which consisted of doing one of the things he had been told not to do.

On the other hand, it has been said by counsel for the plaintiff that those who teach the use of an instrument of this kind should know that their first duty is to teach the use of the guard, and he maintains that as a definite proposition. However, I am certainly not going to say that those engaged in the teaching of the use of these dangerous machines have to obey the code laid down in the Factories Act, 1937, or under it, so far as it orders the provision of guards. If I did so, instruction might be seriously hampered, if not stopped altogether. One has to bear in mind that admittedly here there was an instructor standing by waiting to answer questions, ready to help and ready to show the student. This accident came about, I think, because the plaintiff, instead of calling the instructor, who was not far away, chose to go on experimenting, and, in experimenting, did the very thing which he has told me he had previously been told not to do. I do not think that I have before me an injury caused by the negligence of Hoare, who was standing close by and could have been called. I do not think that he did anything which was unreasonable, careless or not up to the standard of duty which one would expect of an instructor in a London County Council school. In those circumstances, therefore, the necessary result is that there must be judgment for the defendants with costs. A

Judgment for the defendants with costs.

Solicitors: *Breeze, Benton & Co.* (for the plaintiff); *J. R. Howard Roberts* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

B

C

HICHENS HARRISON WOOLSTEN & CO. *v.* JACKSON & SONS.

[King's Bench Division (Viscount Caldecote, L.C.J.), **March 6, 7, 11, 12, 1941.**] D

Stock Exchange—Broker and client—Broker's right to indemnity—Vendor repudiating contract—Broker replacing stock—Sale effected on Bristol Stock Exchange—London Stock Exchange Rules, r. 120.

Solicitors were about to levy execution upon a judgment when they received from the defendant in the action the certificate of certain stock of the Bristol Waterworks Co., the intention being that the E stock should be sold and the proceeds applied to the payment of the judgment and costs. The solicitors, the defendants in this action then wrote, on their usual headed notepaper, to the plaintiffs, who were stockbrokers on the London Stock Exchange, giving them instructions to sell and enclosing the certificates for the shares and a blank transfer which had been handed to them with the certificate for the stock. The F plaintiffs thereupon sent a contract note and a letter headed "Account Miss E. A. Lucas," who was, in fact, the holder of the stock. The contract note stated that the commission was divisible with the defendants. The rules of the London Stock Exchange do not allow a broker to share commission with a principal. The plaintiffs sold that stock on the Bristol Stock Exchange, but the original holder, Miss Lucas, subsequently for no stated reason repudiated the contract and asked the company G for the return of the certificate. The company thereupon refused to register the purchaser as the holder of the stock. In these circumstances the plaintiffs, holding themselves, by the London Stock Exchange Rules, r. 120, bound to replace the stock and obtain clean transfers, sued the defendants to recover their expense in so doing:—

Held: (i) the defendants acted as principals and not as agents in H the sale of the stock.

(ii) although the transaction was ultimately effected on the Bristol Stock Exchange, the contract between the parties hereto was governed by the rules of the London Stock Exchange.

(iii) the plaintiffs were entitled to disregard any other remedy the purchaser may have had in the circumstances and to replace the stock as they did, and, as they acted as agents for the defendants, were entitled to recover from them their expenses in so doing.

[**EDITORIAL NOTE.** It will be noted that the purchaser of the shares had a choice of remedies. He might have sued the vendor, he might have proceeded against the company, or he might have brought his action against the brokers to enforce the terms of the contract of sale implied under the London Stock Exchange Rules. In fact, the brokers felt bound to replace the stock, and then sued their principal, although in fact their principal was an agent of the vendor. It is held that A the brokers had adopted a reasonable course and were entitled to recover.

AS TO BROKER'S RIGHTS OF INDEMNITY, see HALSBURY, Hailsham Edn., Vol. 31, pp. 590-592, paras. 818-822; and FOR CASES, see DIGEST, Vol. 42, pp. 800-805, Nos. 86-134.]

Cases referred to:

B (1) *Wakefield* v. *Duckworth & Co.*, [1915] 1 K.B. 218; 42 Digest 364, *4159*; 84 L.J.K.B. 335; 112 L.T. 130.

(2) *Pearson* v. *Scott* (1878), 9 Ch.D. 198; 42 Digest 72, *641*; 38 L.T. 747; *sub nom. Pierson* v. *Scott,* 47 L.J.Ch. 705.

(3) *London Founders Assocn.* v. *Clarke* (1888), 20 Q.B.D. 576; 42 Digest 827, *361*; 57 L.J.Q.B. 291; 59 L.T. 93.

C (4) *Skinner* v. *City of London Marine Insurance Corpn.* (1885), 14 Q.B.D. 882; 42 Digest 827, *363*; 54 L.J.Q.B. 437; 53 L.T. 191.

(5) *Smith* v. *Reynolds* (1892), 8 T.L.R. 391; 42 Digest 826, *350*; 66 L.T. 808; *affd.* (1893), 9 T.L.R. 494.

D ACTION by brokers on the London Stock Exchange to recover £372 2*s.* 6*d.* in respect of which they claim to be indemnified by the defendants. The facts are fully set out in the judgment.

Cecil R. Havers, K.C., and *H. G. Robertson* for the plaintiffs.

Ivan Horniman for the defendants.

E

VISCOUNT CALDECOTE, L.C.J.: The plaintiffs are stockbrokers and members of the London Stock Exchange, and the defendants are a firm of solicitors practising at Ringwood. The defendants had a client named Etchells who had obtained judgment against a lady named Lucas, and the F sheriff's officer had taken possession of her house and property. They were about to levy execution when her daughter offered and gave the defendants some stock, which was in her name, of the Bristol Waterworks Co., the intention being, as was expressed in a letter written by her to the defendants, that the stock should be sold, the sheriff's execution G provided for in full, and the balance of the proceeds of sale returned to her. By letter dated Apr. 25, the defendants instructed the plaintiffs to sell. The letter enclosed the certificate for the stock—£250 consolidated ordinary stock—together with a blank transfer duly executed. The defendants asked the plaintiffs to realise the stock for the best price H obtainable and to let them have a cheque in due course.

The first question which arises is whether the defendants instructed the plaintiffs to sell as principals or as agents for an undisclosed principal, or perhaps as agent for the legal owner of the stock who had executed the blank transfer—namely, Miss Lucas. Three matters have been relied upon in support of the contention that the defendants gave those instructions to the plaintiffs only as agents, and not as principals. First of all, it was pointed out that the defendants were described on their notepaper as solicitors, and the argument was that that indicated that they were acting for a client. Secondly, it was pointed out that, in the sold note which was in due course sent by the plaintiffs to the defendants, the name of Miss E. A. Lucas appeared, and the letter of Apr. 26, in which the plaintiffs returned the contract note for the sale of the stock, is headed: "Account Miss E. A. Lucas." Further, it was said that the statement appearing on the contract note that the plaintiffs' commission was divisible with Messrs. Jackson, the defendants, shows that Messrs. Jackson were treated as agents, because it is contrary to the rules of the London Stock Exchange for a broker who is a member of the Exchange to share commission with a principal. As to the first ground, solicitors constantly make themselves personally liable in matters which are really and primarily the concern and business of their clients. If they please, they can make it plain that they are not contracting personally or undertaking any personal responsibility. However, the mere fact that Messrs. Jackson were known to be solicitors, and were so described on their notepaper, in this case seems to me to lead to no conclusion one way or the other. As to the second matter relied upon—namely, that the name of Miss Lucas appears on the contract note and at the head of the letter enclosing the contract note—I think that this is merely an indication of the item in the plaintiffs' books. It was to identify the account. It is to be observed, moreover, that the name does not appear in the defendants' letter in which they gave the instructions to the plaintiffs. It only appears in the signature which appears upon the blank transfer. I further observe that Miss Lucas was not the defendants' client, and at that stage it could hardly be said that, merely because the item was identified by the fact that Miss Lucas was the transferor, that is any reason for saying that they were writing the letter as her agent. As to the third ground, I am willing to assume that the plaintiffs would not break the rule of the London Stock Exchange, but, if the solicitors were—as no doubt they were—primarily agents, there seems to me to be nothing in the rules of the London Stock Exchange to prevent them from drawing their commission even though they were contracting personally. In any case, however, this matter seems to me incapable of throwing any real light upon the capacity in which the defendants contracted, because, although I think that it is very unlikely that the plaintiffs could have broken the Stock Exchange rules, any indications which this matter gives seem to me to be quite inconclusive. All three of these grounds, in my judgment, amount to nothing on this question of whether the defendants contracted personally or as agents.

On the other hand, there are many indications which I think are of weight to lead to the contrary view. The plaintiffs had never heard of Etchells, who was the defendants' client. They knew nothing about Miss Lucas, except that her name appeared upon the transfer. They would be very unlikely to deal with an unknown principal or to take instructions from someone who was nothing more than a name upon a blank transfer. They would incur risks which it would be difficult for them to guard against, and as to which they would have nobody to fall back upon except someone as to whose existence they knew nothing except that the name appeared on the transfer. One further matter is of importance. The letter of Apr. 25 is signed by the defendant firm without qualification, and there is nothing whatever in the letter to displace the inference, which I think is the right one, that the defendants were giving their instructions to the plaintiff stockbrokers personally, and not as agents.

Counsel for the defendants relied upon two decisions which, in his view, supported his contention. The first was *Wakefield* v. *Duckworth & Co.* (1), in which solicitors were held by the county court judge not to be liable to pay for photographs which they had ordered verbally for the purpose of some litigation in which their client was engaged. The Divisional Court did not interfere with the decision of the county court judge, but, on the facts of that case, the decision was one which, in my view, throws no light at all upon the very different circumstances of the present case. The other case to which I was referred was *Pearson* v. *Scott* (2), which does contain one passage which perhaps at first sight might appear to be authority for the view that, where stockbrokers are dealing with a solicitor who sends a transfer bearing the names of other persons for the sale of a security, the solicitor cannot be heard to say that he was contracting otherwise than as agent for the persons whose names appear. However, in the view which I take of this case, it is not an authority on the question of principal and agent. It decides that, if a broker is employed to sell securities in the name of someone other than his client, he is put upon inquiry as to their interests, and payment to the client will not discharge him. I note that in *Pearson* v. *Scott* (2) the client had absconded, and the owner's only remedy, therefore, was to look to the broker. That case, as I have said, is not an authority for the proposition for which it was cited here. I therefore come to the conclusion that the defendants must be deemed here to have contracted personally. No contrary intention appears from any of the circumstances, still less from the letter in which they gave instructions, and I hold, therefore, that the defendants gave their instructions as principals.

That brings me to the more difficult question involved in the plaintiffs' second submission—namely, whether the plaintiffs were obliged or compellable to provide other stock in the following circumstances. The stock, as I have said, was sold. It was sold through or to Messrs. Evans, a firm of stockbrokers who were members, not of the London Stock Exchange, but of the Bristol Stock Exchange, and Messrs. Evans sold to a firm of accountants who were in fact acting on behalf of one Fry. Fry paid the purchase price, and the money eventually was paid by Messrs. Hichens, Harrison, Woolsten & Co., after deduction of their own commission, to the defendant firm, who paid out Etchells and sent a cheque for the balance to Miss Lucas. Miss Lucas preferred not to take the cheque, and I understand that the money is still in the hands of the defendants. However, Miss Lucas did not stop there. She adopted an attitude which may have been altogether her own or may have been instigated by Mrs. Lucas. Having first of all asked the Bristol Waterworks Co. to hold up the sale of her shares until they heard from her solicitors, on May 24, a few days later, she said that there was nothing for her to do but to ask the company to return the scrip of her shares to her personally. Finally, on June 4, she repudiated her signature, at any rate to the extent that, although the signature, she says, on the transfer deed was authentic, it was obtained under fraud and compulsion.

In those circumstances, the Bristol Waterworks Co. had either to act upon the transfer and run the risk of some proceedings by Miss Lucas or to take the precaution of not registering the stock in the buyer's name until Miss Lucas' position was cleared up. In fact, they took the latter course, with the result that, although Fry, the purchaser, had paid for the stock, he got nothing by it, and his position was, as no doubt counsel for the defendants suggested, that, if he wanted to be registered, he must initiate legal proceedings. Counsel for the defendants submitted (and I think rightly submitted) that Fry might have taken appropriate steps under the provision in the Companies Act, 1929, to have his name put upon the register. However, there was no reason why he should take this course if other remedies were open to him, and if, by the ordinary operation of the rules of the London Stock Exchange, the brokers responsible could be made to produce clean transfers—that is to say, transfers which the company could accept and register without any question arising.

The question is whether there was any other remedy, or whether the plaintiff firm was under any obligation to produce transfers which, to use the expression of counsel for the plaintiffs, were clean transfers. It is said by counsel for the plaintiffs that the brokers, Messrs. Evans, were in a position to compel the plaintiffs to deliver other stock because the plaintiffs and Messrs. Evans contracted under the rules of the London Stock Exchange. First of all, I think that they did so contract. The plaintiffs' sold note in my opinion represents the real transaction. Counsel for the defendants said that it was not an accurate record of the transaction, but, in my judgment, it was. The defendants went to the plaintiffs knowing that they would sell subject to the rules and regulations of the London Stock Exchange, and, even though the plaintiffs, in accordance with the rule of the London Stock Exchange, sold, not on the London Stock Exchange, but on the Bristol Stock Exchange, where they could get a better price, the transaction was subject to the rules and regulations of the London Stock Exchange.

I understand that it was conceded by counsel for the defendants in his very thorough argument that, if this had been a transaction between the plaintiffs and a jobber, and so subject to the rules of the London Stock Exchange, the plaintiffs would have been liable to replace the stock.

However, whether or not that concession is made, that is how I view the position. By r. 120 of the London Stock Exchange, under which, as I have said, the transaction was carried out, the seller of securities is responsible for the genuineness and regularity of all documents delivered.

A At this point, I think it is convenient to look at the authorities which have been referred to by each side. The first is *London Founders Assocn.* v. *Clarke* (3). The plaintiffs in that case had bought shares in a company whose articles had a provision entitling the directors to exercise a discretion as to the registration of transferees. The court in that case held B that a vendor of shares on the London Stock Exchange does not guarantee that the shares will be registered in the names of purchasers, and LORD ESHER, M.R., said, at p. 582 :

> I do not think that the vendor does undertake that the company will accept the purchaser so as to make himself responsible for their refusal to do so. The purchaser takes that risk on himself, and the seller's liability is satisfied by handing to the C purchaser the transfer and certificates of the shares in proper form, and doing nothing either before or subsequently to prevent the registration of the purchaser.

It will be noticed there that, as LORD ESHER, M.R., states, the obligation on the part of the seller is to hand to the purchaser the transfer and certificates of the shares in proper form, and to do nothing, either before D or subsequently, to prevent the registration of the purchaser.

In *Skinner* v. *City of London Marine Insurance Corpn.* (4), SIR WILLIAM BRETT, M.R., similarly dealt with the position of a seller on a bargain and sale of registered shares of a company. He said, at p. 887 :

> It seems to me that the only contract in such a case is that the seller shall execute a valid transfer of the shares and hand the same over to the transferee, and so do E all that is necessary to enable the transferee to insist with the company on his right to be registered a member in respect of such shares.

Lastly, in *Smith* v. *Reynolds* (5) in the Court of Appeal, the court was dealing with r. 92, which is the corresponding rule to what is now r. 120. Rule 92 provided as follows :

> F The seller of shares or stock is responsible for the genuineness and regularity of all documents delivered, and for such dividends as may be received. . . .

In that case, LORD ESHER, M.R., said :

> The defendant chose to sell shares through a broker on the Stock Exchange. The Stock Exchange was a market, and had certain rules. Therefore, any one instructing a broker to buy or sell shares on the Stock Exchange was liable to G indemnify the broker for any liability incurred by him in carrying out his instructions by reason of the rules of the Stock Exchange, so long as those rules were reasonable. That principle applied to all markets.

Then LORD ESHER, M.R., went on to deal with the question of the reasonableness of r. 92, and the court came to the conclusion that it was a H reasonable rule, and that, therefore, the reliance which was placed upon it was proper. That judgment of the Court of Appeal was approved in the House of Lords by LORD HERSCHELL, L.C., and the other members of the House.

It will be noticed that different words have been used—proper, valid regular—and it seems to me that they all amount to the same thing. Here the obligation on the part of the sellers, who, as I have said, were the defendants, was to produce regular or valid or proper transfers, besides providing the certificate or having the transfer certificated, and to do nothing to interfere with or prevent the registration of the stock in the name of the transferee. There being no question here as to the reasonableness of the rule—there could be no question in the light of the decision in *Smith* v. *Reynolds* (5)—the rule, in my view, is supported by the cases to which I have referred, and, in my judgment, the defendant firm is liable upon the principle which was stated by Lord Esher, M.R., in *Smith* v. *Reynolds* (5),to which I have just referred. There is no question as to what that principle is. It is that an agent who, in the course of the execution by him of his duty, incurs losses and liabilities is entitled to be reimbursed by the person for whom he acts. The principle is stated in Bowstead on Agency, arts. 70, 71. No question has been raised as to the application or correctness of the rule as there stated. The point which has been taken is that the plaintiffs were not compellable to replace the stock which could not be registered in the name of the transferee with other stock which could be, and, therefore, the principle does not apply.

There is only one further matter to be dealt with, and I can dispose of it briefly. Counsel for the defendants made the submission that Messrs. Evans, the Bristol stockbrokers, having brought the buyer—namely Fry—and the sellers together, dropped out, and that the parties must then enforce their remedies against each other. That seems to me not to be the position. Whatever may be the position of an agent in a sale of land, which counsel for the defendants used as an illustration, Messrs. Evans' position was secured by their contract made in pursuance of and under the rules and regulations of the London Stock Exchange. They were entitled, in my judgment, to call upon the plaintiffs to produce stock which could be registered in the name of the buyer, and, in those circumstances, having regard to the principle which I have stated, the plaintiffs are entitled to be indemnified by the defendants in respect of the liability which they have incurred to Messrs. Evans. In my view, the plaintiffs' case has been made out, and there must be judgment against the defendants for the sum of £372 2*s*. 6*d*. with costs.

Judgment for the plaintiffs for £372 2*s*. 6*d*. *with interest at* 4 *per cent. and costs.*

Solicitors: *Roney & Co.* (for the plaintiffs); *Hair & Co.* (for the defendants).

[*Reported by* D. K. Belcher, *Barrister-at-Law.*]

END OF VOLUME 1.